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Pattie S. Christensen v. Daniel R. Christensen : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

PATTIE S. CHRISTENSEN, nka Pattie S. BRUBAKER Plaintiff and Appellant	
v.	CASE NO. 960312-CA
DANIEL R CHRISTENSEN, Defendant and Appellee	PRIORITY 4

ADDENDUM
TO
BRIEF OF APPELLANT

APPEAL FROM A JUDGEMENT IN THE FOURTH JUDICIAL DISTRICT COURT, IN AND FOR UTAH COUNTY, STATE OF UTAH, THE HONORABLE STEVEN L. HANSEN PRESIDING, REQUIRING THE NAME CHANGE OF A MINOR CHILD FROM THAT USED FOR SEVEN YEARS AND SHARED WITH HER PRESENT [STEP] FAMILY, BACK TO THE NAME OF THE NATURAL FATHER.

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Ludvina ALMEIDA, Plaintiff-Appellee,
v.
George Thomas ALMEIDA, Defendant-Appellant.

No. 8651.

Intermediate Court of Appeals of Hawaii.

Sept. 9, 1983.

Suit was instituted to divest defendant of his interest in certain real property and to vest that interest in plaintiff as his joint tenant. The Second Circuit Court, Maui County, Kase Higa, J., entered judgment for plaintiff, and defendant appealed. The Intermediate Court of Appeals, Tanaka, J., held that: (1) denial of motion to dismiss complaint on grounds that plaintiff failed to join an indispensable party was not reversible error; (2) finding that plaintiff's deed to property was not a gift, but in consideration of defendant's agreement to care for her after his retirement from military service was supported by clear and convincing evidence; (3) defendant's agreement with plaintiff was not so lacking in reasonable certainty as to preclude its enforcement; (4) suit was filed within one month of time defendant breached agreement and, hence, was timely commenced within six-year period of limitations; (5) doctrine of laches did not apply in absence of a showing of extraordinary circumstances; (6) proper remedy was not an award of damages instead of divestiture on ground that defendant's oral promise to plaintiff was a covenant rather than a condition subsequent; (7) it was unnecessary to require cograntor to join in lawsuit; and (8) plaintiff did not have an adequate remedy at law so as to preclude the equitable remedy of divestiture.

Affirmed.

[1] PARTIES⚿ 18
287⚿18
Rule regarding indispensable parties is founded on equitable considerations and is not jurisdictional. Fed.Rules Civ.Proc.Rules 19, 19 note, 28 U.S.C.A.; Rules Civ.Proc., Rules 19, 19(b).

[1] PARTIES⚿ 29
287⚿29
Rule regarding indispensable parties is founded on equitable considerations and is not jurisdictional. Fed.Rules Civ.Proc.Rules 19, 19 note, 28 U.S.C.A.; Rules Civ.Proc., Rules 19, 19(b).

[2] PRETRIAL PROCEDURE⚿ 558
307A⚿558
Even if an absent party is needed for just adjudication of a claim, a decision to dismiss must be based on the test of pragmatic equity and good conscience. Fed.Rules Civ.Proc.Rules 19, 19 note, 28 U.S.C.A.; Rules Civ.Proc., Rules 19, 19(b).

[3] APPEAL AND ERROR⚿ 1061.2
30⚿1061.2
Denial of defendant's motion to dismiss divestiture action, based on failure to join a cograntor as an indispensable party, was not reversible error, where defendant waited to file his motion until day of trial when plaintiff was in court ready to proceed, and since a decision on the merits would not be binding on the cograntor, it was unlikely that the cograntor would be adversely affected in a practical sense. Fed.Rules Civ.Proc.Rules 19, 19 note, 28 U.S.C.A.; Rules Civ.Proc., Rules 19, 19(b).

[4] GIFTS⚿ 1
191⚿1
A "gift" is a voluntary transfer of property by one person to another without any consideration or compensation therefor and contains as essential elements, a donative intent, delivery and acceptance.
See publication Words and Phrases for other judicial constructions and definitions.

[5] GIFTS⚿ 47(1)
191⚿47(1)
The burden of proving an alleged gift is generally on the donee, but in cases of close kinship, there is a presumption that a gift was intended, and the presumption must be rebutted by clear and convincing evidence.

[6] EVIDENCE⚿ 596(1)
157⚿596(1)
Evidence of a clear and convincing nature is such evidence as will produce in the mind of a reasonable person a firm belief as to the facts sought to be established.

[7] EVIDENCE⚿ 596(1)
157⚿596(1)

A conflict in evidence will not preclude the evidence from being clear and convincing since the trier of fact may resolve the conflict on the basis of the credibility of the witnesses and the weight of the evidence.

[8] GIFTS 49(4)
191 49(4)
Finding that the deed by which plaintiff and her cograntor conveyed a joint interest in property to defendant was not executed as a gift, but was executed in consideration of defendant's agreement to care for plaintiff after his retirement from military service was supported by clear and convincing evidence in action to divest defendant of his interest in property when he failed and refused to perform his part of agreement.

[9] CONTRACTS 9(1)
95 9(1)
The law leans against the destruction of contracts for uncertainty and in favor of the determination that an agreement is sufficiently definite.

[10] CONTRACTS 9(2)
95 9(2)
An agreement to support a person is not uncertain because a court or jury can determine in each case what performance is reasonably necessary for support.

[11] CONTRACTS 9(2)
95 9(2)
Agreement whereby defendant was to care for plaintiff's needs for remainder of her life upon his retirement from military service, in return for which she would deed to him certain real property, was not so lacking in reasonable certainty as to preclude its enforceability.

[12] LIMITATION OF ACTIONS 46(6)
241 46(6)
The statute of limitations does not generally begin to run on a contract until it is breached, but in the absence of a repudiation, the statute does not begin to run until the agreement is to be performed. HRS § 657-1.

[13] LIMITATION OF ACTIONS 46(1)
241 46(1)
Suit to divest defendant of his interest in certain real property on ground of his failure to fulfill his agreement to care for plaintiff's needs upon his retirement from military service was commenced in October of 1980, only a short time after his retirement from military service in September of 1980, and was timely filed within applicable six-year period of limitations absent evidence that his refusal to reconvey his interest in property to plaintiff in 1970 was an anticipatory breach of his agreement. HRS § 657-1.

[14] EQUITY 67
150 67
The laches doctrine is based on the maxim that equity aids the vigilant, not those who slumber on their rights.

[15] EQUITY 87(2)
150 87(2)
The doctrine of laches did not apply to preclude plaintiff from bringing an action to divest her son, the defendant, from certain real property upon his failure to fulfill his agreement to care for the plaintiff's needs where the action was commenced within a month of the time the applicable six-year period of limitations began to run. HRS § 657-1.

[16] CANCELLATION OF INSTRUMENTS 3
69 3
Although the courts have decreed rescission and cancellation or reconveyance upon a breach of a promise to support when the promise is deemed to be a condition subsequent, the absence of a condition subsequent will not preclude a court from decreeing rescission and cancellation or other equitable remedy.

[17] CANCELLATION OF INSTRUMENTS 14
69 14
Where plaintiff, who was of advanced age, had property conveyed to herself and her son, the defendant, in consideration of defendant's oral promise to support her, breached his agreement, there was a failure of consideration and, even assuming that defendant's promise to support was not a condition subsequent, trial court was authorized and was vested with discretion to grant plaintiff divestiture rather than to award damages.

[17] CONTRACTS 83
95 83
Where plaintiff, who was of advanced age, had property conveyed to herself and her son, the defendant, in consideration of defendant's oral promise

to support her, breached his agreement, there was a failure of consideration and, even assuming that defendant's promise to support was not a condition subsequent, trial court was authorized and was vested with discretion to grant plaintiff divestiture rather than to award damages.

[18] EQUITY 1
150 1
The relief granted in equity is dictated by the equitable requirements of the situation at hand and must be adapted to the facts and circumstances of the particular case.

[18] JUDGMENT 204
228 204
The relief granted in equity is dictated by the equitable requirements of the situation at hand and must be adapted to the facts and circumstances of the particular case.

[19] CANCELLATION OF INSTRUMENTS 35(1)
69 35(1)
Where plaintiff had right to have her son's interest in property restored to her consensually or by judicial action, but did neither and, instead, caused her first son to convey property together with herself to the defendant, her second son, by deed, and defendant failed in his oral promise to support plaintiff which he gave as consideration for deed, trial court could properly mold its decree to divest defendant's interest in property and vest same in plaintiff, and it was unnecessary to require first son to join in lawsuit.

[19] CANCELLATION OF INSTRUMENTS 56
69 56
Where plaintiff had right to have her son's interest in property restored to her consensually or by judicial action, but did neither and, instead, caused her first son to convey property together with herself to the defendant, her second son, by deed, and defendant failed in his oral promise to support plaintiff which he gave as consideration for deed, trial court could properly mold its decree to divest defendant's interest in property and vest same in plaintiff, and it was unnecessary to require first son to join in lawsuit.

[20] CANCELLATION OF INSTRUMENTS 3
69 3
Where there has been a failure of consideration of support for a deed, equitable remedy of rescission and cancellation is proper, especially where grantor is aged.

[21] CANCELLATION OF INSTRUMENTS 10
69 10
Although trial court concluded, in the alternative, that the property could remain in the names of the plaintiff and defendant as joint tenants, provided that plaintiff would have the beneficial interest of the property during her lifetime and that defendant would pay plaintiff $250 per month, where defendant represented that he was unable to pay $250 monthly, there was no adequate remedy at law and trial court did not, therefore, err in ordering an equitable remedy of divestiture upon failure of consideration of support for a deed.

****176** Syllabus by the Court

1. ***513** The rule regarding indispensable parties is founded on equitable considerations and is not jurisdictional. Even if an absent party is deemed needed for the just adjudication of a claim, a decision to dismiss must be based on the pragmatic "equity and good conscience" test of Rule 19(b), Hawaii Rules of Civil Procedure.

2. Where defendant delayed in making his motion to dismiss the complaint on the ground that plaintiff failed to join an indispensable party until the very morning of the trial and the absent party would not be adversely affected, the denial of the motion was not reversible error.

3. A gift is a voluntary transfer of property by one person to another without any consideration or compensation and its essential elements are donative intent, delivery, and acceptance.

4. The burden of proving an alleged gift is usually on the donee. However, in cases of close kinship between the donor and donee, there is a presumption that a gift was intended and the presumption must be rebutted by clear and convincing evidence.

5. An agreement to support a person is not uncertain because a court or jury can determine in each case what

performance is reasonably necessary for support.

6. Generally, the statute of limitations does not begin to run on a contract until it is breached. In the absence of repudiation, the limitations period does not begin to run until the contract is to be performed.

7. *514 In the absence of extraordinary circumstances, a court of equity will usually grant or withhold relief in analogy to the statute of limitations relating to law actions of like character.

8. Where the consideration for a deed is an agreement of support, the courts tend to be lenient toward the grantor, especially if the grantor is aged. The relief accorded such grantor may be rescission and cancellation of the deed or other equitable remedies.

9. The relief granted in equity is dictated by the equitable requirements of the situation and must be adapted to the facts and circumstances of the particular case.

*525 Edward S. Kushi, Jr., Wailuku, (Law Offices of Lawrence N.C. Ing, Crockett & Nakamura, Wailuku, of counsel), for defendant-appellant.

Edward F. Mason, Wailuku (Mason and Scott, Wailuku, of counsel), for plaintiff-appellee.

Before *513 BURNS, C.J., and HEEN and TANAKA, JJ.

TANAKA, Judge.

Defendant George Thomas Almeida (George) appeals from the judgment divesting him of his interest in certain real property **177 and vesting it in his joint tenant, plaintiff Ludvina Almeida (Mrs. Almeida). We affirm.

The action involves Lot 12-B, area 12,000 square feet, together with an undivided one-half interest in a roadway lot and two easements (the Property), located in Pukalani, Maui. Mrs. Almeida and her husband, Manuel Almeida (Mr. Almeida), acquired the Property in 1951. By deed dated December 26, 1961, Mr. and Mrs. Almeida conveyed the Property to their son George and his wife Mildred S. Almeida (Mildred). Upon the request of Mrs. Almeida, George and Mildred conveyed the Property to her by deed dated March 12, 1963.

Shortly after Mr. Almeida died in 1964, Mrs. Almeida built a house on the Property where she has since resided. By deed dated March 19, 1965, Mrs. Almeida conveyed the Property to herself and her son Harry Almeida (Harry), as joint tenants. By deed dated February 15, 1968 (1968 Deed), Mrs. Almeida and Harry conveyed the Property to Mrs. Almeida and George, as joint tenants.

On October 22, 1980, Mrs. Almeida filed a complaint alleging, inter alia, that (1) she and George agreed that upon his retirement from military service, George would return to Maui, reside with her, and care for her needs for the rest of her life and, in return, she would insure that he would become the *515 owner of the Property upon her death; (2) she fulfilled her end of the promise by the execution of the 1968 Deed; and (3) George failed and refused to perform his part of the agreement. She sought a decree divesting George of all right, title and interest in the Property.

George counterclaimed alleging joint ownership of the Property and seeking partition.

After a bench trial, the trial court entered its findings of fact and conclusions of law on October 20, 1981 and its judgment on December 9, 1981. The judgment "divested" George of his "right, title and interest" in the Property, "vested" the same in Mrs. Almeida and dismissed George's counterclaim. George appeals.

The issues on appeal are whether the trial court erred (1) in denying George's motion to dismiss for want of an indispensable party, (2) in failing to find that the 1968 Deed effected a gift of a joint interest in the Property to George, (3) in finding an agreement by George to care for Mrs. Almeida, (4) in ruling against George's affirmative defenses of statute of limitations and laches, and (5) in decreeing divestiture of George's interest in the Property. We find no reversible error.

I.

On the morning of September 8, 1981, when the trial commenced, George filed a motion to dismiss the complaint. He contended, inter alia, that the complaint should be dismissed because, as a co-grantor in the

1968 Deed, Harry was an indispensable party to the suit. On the same morning, the trial court orally denied the motion. [FN1]

FN1. No written order denying the motion to dismiss was filed.

[1][2] At the outset, we observe that Rule 19, Hawaii Rules of Civil Procedure (HRCP) (1981), [FN2] regarding indispensable parties *516 **178 "is founded on equitable considerations, and is not jurisdictional." Midkiff v. Kobayashi, 54 Haw. 299, 324, 507 P.2d 724, 739 (1973). Even if an absentee is deemed needed for the just adjudication of a claim, a decision to dismiss must be based on the pragmatic "equity and good conscience" test of Rule 19(b), HRCP. Therefore, after the conclusion of a trial on the merits, there is reluctance on the part of an appellate court to overturn the trial court's decision as to indispensable parties, unless there is real prejudice to the absentee. 7 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 1609 (1972).

FN2. The applicable provisions of Rule 19, Hawaii Rules of Civil Procedure (1981), provide:

(a) Persons to be Joined if Feasible. A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (A) as a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff.

(b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

We are aware of the pronouncement of our supreme court that the "[a]bsence of indispensable parties can be raised at any time even by a reviewing court on its own motion." Haiku Plantations Ass'n v. Lono, 56 Haw. 96, 103, 529 P.2d 1, 5 (1974) (quoting Filipino Federation of America v. Cubico, 46 Haw. 353, 369, 380 P.2d 488, 497 (1963)).

We are also cognizant of the fact that Rule 19, HRCP, was amended in 1972 to conform to Rule 19, Federal Rules of Civil Procedure, as revised in 1966. The Advisory Committee on the Federal Rules of Civil Procedure, in its Note on the 1966 Revision of Rule 19, quoted at 3A J. Moore & J. Lucas, Federal Practice ¶ 19.01[5.-4] (2d ed. 1982), comments as follows:

*517 [W]hen the moving party is seeking dismissal in order to protect himself against a later suit by the absent person ..., and is not seeking vacariously [sic] to protect the absent person against a prejudicial judgment ..., his undue delay in making the motion can properly be counted against him as a reason for denying the motion.

In National Board of YWCA v. YWCA of Charleston, S.C., 335 F.Supp. 615 (D.S.C.1971), defendant moved to dismiss the complaint on the ground that plaintiff failed to join an indispensable party. The court held that "defendant's delay in making its motion until the very morning of trial would warrant its denial because of laches." Id. at 627.

[3] George's primary complaint is that the absence of Harry may subject George to "multiple suits and result in inconsistent judicial decisions imposing undue hardship" on him. Reply Brief at 5. Applying the above principles, we believe that it was fatal for George to have waited to file his motion until the day of trial when Mrs. Almeida was in court ready to proceed. Furthermore, it appeared unlikely that Harry would be adversely affected in a practical sense. A decision on the merits would not have been binding on him.

Consequently, we hold that the trial court's denial of George's motion to dismiss was not reversible error.

II.

[4] "A 'gift' is generally defined as a voluntary transfer of property by one person to another without any consideration or compensation therefor." Welton v. Gallagher, 2 Haw.App. 242, 245, 630 P.2d 1077, 1081 (1982), aff'd, 65 Haw. 528, 654 P.2d 1349 (1982). To constitute a gift, the essential elements are (1) donative intent, (2) delivery, and (3) acceptance. Estate of Lalakea, 26 Haw. 243 (1922); 38 Am.Jur.2d Gifts §§ 17, 20, 34 (1968).

There is no dispute as to delivery and acceptance of the 1968 Deed in this case. The bone of contention is the element of donative intent.

[5] Generally, the burden of proving an alleged gift is on the donee. Siko v. Seguirant, 51 Haw. 118, 452 P.2d 447 (1969); Welton v. Gallagher, supra. However, in cases **179 of close kinship. *518 there is a presumption that a gift was intended and the presumption must be rebutted by clear and convincing evidence. Ables v. Ables, 39 Haw. 598 (1952); Welton v. Gallagher, 2 Haw.App. at 245 n. 1, 630 P.2d at 1081.

Claiming that Mrs. Almeida failed by clear and convincing evidence to rebut the presumption that the 1968 Deed conveying a joint interest in the Property to him was a gift, George contends that the trial court erred in not finding a gift. On the other hand, Mrs. Almeida argues that the evidence was clear and convincing that the conveyance was in consideration of George's agreement to care for her after his retirement from military service; therefore, no gift was intended or involved.

[6][7] Clear and convincing evidence means such evidence as will produce "in the mind of a reasonable person a firm belief as to the facts sought to be established." Welton v. Gallagher, 2 Haw.App. at 246, 630 P.2d at 1081. We do not believe that conflicting evidence per se precludes it from being clear and convincing. The trier of fact must resolve "the conflicting evidence based on the credibility of the witnesses and the weight of the evidence." Anders v. State, 60 Haw. 381, 392, 590 P.2d 564, 570 (1979). See also MPM Hawaiian, Inc. v. Amigos, Inc., 63 Haw. 485, 630 P.2d 1075 (1981); Shinn v. Edwin Yee, Ltd., 57 Haw. 215, 553 P.2d 733 (1976); Siko v. Seguirant, supra.

George argues that because the 1968 Deed contained no covenant or condition of his promise to care for Mrs. Almeida, the evidence is not clear and convincing that there was no donative intent. The court below found that in consideration of the conveyance George promised Mrs. Almeida "that upon his retirement from the military service he would care for [her] needs for the remainder of her natural life." Finding of Fact No. 8. Mrs. Almeida, who was 78 years of age at the time of trial, testified unequivocally that George so promised. Her son Albert Almeida (Albert) testified that after 1968 George confirmed his promise to Mrs Almeida to take care of her. George's testimony was that he made no such promise to his mother.

[8] We hold that (1) the trier of fact, the trial court in this case, resolved the conflicting evidence by finding the testimony of Mrs. Almeida and Albert to be credible and (2) as so resolved, *519 the evidence could reasonably produce in its mind a firm belief that George did make the promise in contention to Mrs. Almeida, and no gift was intended.

III.

George asserts that the trial court erred in finding and concluding that there was a "contract" enforceable by Mrs. Almeida. He argues that his alleged promise to "care for" Mrs. Almeida lacked reasonable certainty. We disagree.

Restatement (Second) of Contracts § 33 (1981) provides in relevant part:

> (1) Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.
>
> (2) The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.

See Francone v. McClay, 41 Haw. 72 (1955); Clarkin v. Reimann, 2 Haw.App. 618, 638 P.2d 857 (1981).

[9] We have announced the policy that "the law leans against the destruction of contracts for uncertainty" and that "[c]ourts favor the determination that an agreement is sufficiently definite." In re Sing Chong Co., Ltd., 1 Haw.App. 236, 239, 617 P.2d 578, 581

(1980).

[10] Professor Corbin states that an agreement "to support a person is not too indefinite" because a "court or jury can determine in each case what performance is reasonably necessary for support." 1 A. Corbin, Corbin on Contracts § 100, n. 56 (1963). An agreement to "care for" the grantor in a deed is broad enough to mean an obligation to provide support to him. Walton v. Walton, 113 Ga.App. 400, 148 S.E.2d 331 (1966). A written agreement in **180 the deed to provide "adequate care and maintenance of [the grantor] during the remainder of [her] lifetime" was not questioned as lacking reasonable certainty to preclude enforceability in Anderson v. Anderson, 620 S.W.2d 815, 817 (Tex.App.1981). See also Fisher v. Sellers, 214 Ark. 635, 217 S.W.2d 331 (1949); Cook v. Adams, 89 So.2d 6 (Fla.1956).

*520 Our supreme court has stated that "an undertaking and promise of the grantee to provide for the grantors a comfortable and suitable support and maintenance during the remainder of their respective lives," together with love and affection and one dollar, constitute good and sufficient consideration. In re Kealiiahonui, 9 Haw. 1, 7 (1893). George's promise to "care for" Mrs. Almeida was equivalent to a promise to support her.

[11] Thus, there was reasonable certainty and the trial court did not err in finding and concluding that George's promise to "care for" Mrs. Almeida constituted an enforceable agreement.

IV.

George claims that under the facts of the case, he should have prevailed on his affirmative defense of statute of limitations or laches. He argues that (1) his alleged agreement to care for Mrs. Almeida was made at or about the time of the execution of the 1968 Deed; (2) in 1970, Mrs. Almeida sought to have him convey his interest in the Property to her which he refused to do; (3) Mrs. Almeida filed her complaint on October 22, 1980; (4) she "had knowledge of the facts and circumstances to bring her claim" in 1970 (Opening Brief at 27); and (4) thus, her action commenced in 1980 was too late. George's claim is without merit.

[12] Mrs. Almeida's claim was based on a breach of an agreement. Generally, the statute of limitations does not begin to run on a contract until it is breached. See Au v. Au, 63 Haw. 210, 626 P.2d 173 (1981). Furthermore, in the absence of a repudiation, the limitations period does not begin to run until the agreement is to be performed. 51 Am.Jur.2d Limitation of Actions § 126 (1970).

[13] Here, George's promise was to take care of Mrs. Almeida after his retirement from military service. He retired in September 1980, although he had returned to Maui earlier in July 1980. His breach of the agreement occurred in September 1980 after his retirement. Furthermore, the record is devoid of any evidence that his refusal to reconvey his interest to Mrs. Almeida in 1970 was an anticipatory breach of his promise. The instant law suit was commenced in October 1980, only a *521 short time after the six- year limitations period of HRS § 657-1 (1976 & Supp.1982) began running.

[14] Mrs. Almeida's quest for equitable relief subjects her to the defense of laches. The laches doctrine is based on the maxim that "equity aids the vigilant, not those who slumber on their rights." Adair v. Hustace, 64 Haw. 314, 320, 640 P.2d 294, 300 (1982) (quoting 2 S. Symons, Pomeroy's Equity Jurisprudence § 418 (5th ed. 1941)). Although "[a] court of equity is not bound by the statute of limitations, ... in the absence of extraordinary circumstances, it will usually grant or withhold relief in analogy to the statute of limitations relating to law actions of like character." Yokochi v. Yoshimoto, 44 Haw. 297, 300, 353 P.2d 820, 823 (1960).

[15] Mrs. Almeida commenced her action about a month after the analogous six-year limitations period began running. Since George has failed to show any extraordinary circumstance in the case, the doctrine of laches does not apply.

V.

Finally, George contends that the conclusion of law and judgment of the trial court divesting the joint interest of George in the Property and vesting it in Mrs. Almeida were erroneous for three reasons. First, since the 1968 Deed was absolute and unconditional, George's oral promise was a covenant rather than a condition subsequent, so the proper remedy was the award of damages and not divestiture. Second,

inasmuch as Harry was a co-grantor in the 1968 Deed, the trial court could not vest in Mrs. Almeida the interest George acquired from Harry. Third, since the trial court concluded, in the alternative, that the parties **181 may remain as joint tenants of the Property provided that (1) Mrs. Almeida shall have the beneficial use thereof until her death and (2) George shall pay her $250 per month commencing September 1, 1980 (Conclusion of Law No. 7), there was an adequate remedy at law. We do not agree.

A.

Citing State v. Thom, 58 Haw. 8, 563 P.2d 982 (1977), George contends that the 1968 Deed must be construed in *522 accordance with the intention of the parties, as ascertained from the language of the deed. The 1968 Deed recites a consideration of one dollar and love and affection and conveys the Property to Mrs. Almeida and George, as joint tenants, absolutely and unconditionally. Therefore, George argues that his oral promise to support Mrs. Almeida is not a condition of conveyance but a covenant. For a breach of such covenant, Mrs. Almeida is entitled only to a money judgment.

State v. Thom, supra, sets forth the general law regarding deeds of conveyance. However, the judicial treatment of deeds in consideration of support is unique and may be summarized as follows:

> Where a deed depends for its consideration upon a promise of support the courts have shown a great deal of leniency toward the grantor. Relief is granted in a variety of ways when the grantee does not fulfil his promise. The deed is sometimes treated as voidable at the option of the grantor, or the deed may be set aside for lack of consideration or the deed treated as conveying a fee upon a condition subsequent.

6 G. Thompson, Real Property § 3117, at 906-07 (1962). See also 26 C.J.S. Deeds § 21 (1956); 73 Am.Jur.2d Support of Persons §§ 26, 36, 40 (1974).

Courts have evinced their concern in this area and acted to grant equitable relief "particularly where the grantor is of advanced years." 26 C.J.S., supra, at 620. Upon the grantee's breach, courts have cancelled or voided a deed even where the promise to support was not specified in the deed itself but appeared in a separate writing, Shook v. Bergstrasser, 356 Pa. 167, 51 A.2d 681 (1947), or was orally made by the grantee. Lewelling v. McElroy, 148 Neb. 309, 27 N.W.2d 268 (1947); Frasher v. Frasher, 249 S.E.2d 513 (W.Va.1978); Nadler v. Nadler, 242 Wis. 537, 8 N.W.2d 306 (1943).

[16] Where the promise to support is deemed to be a condition subsequent, the courts have decreed rescission and cancellation or reconveyance upon breach of the promise. Nadler v. Nadler, supra; Glocke v. Glocke, 113 Wis. 303, 89 N.W. 118 (1902). However, the absence of a condition subsequent has not precluded a court from decreeing rescission and cancellation or other equitable remedies. Finding failure of consideration *523 upon the grantee's breach, courts have cancelled the deed and restored the property to the grantor. Cook v. Adams, supra; Lewelling v. McElroy, supra; Shook v. Bergstrasser, supra; Johnson v. Kiser, 216 Va. 794, 223 S.E.2d 871 (1976); Frasher v. Frasher, supra. In some cases, the courts have utilized the remedy of constructive trust. Loschen v. Clark, 256 Iowa 413, 127 N.W.2d 600 (1964); Dietz v. Dietz, 244 Minn. 330, 70 N.W.2d 281 (1955).

[17] Here, Mrs. Almeida, who was of advanced age, had the Property conveyed to herself and George in consideration of George's oral promise to support her. George breached his agreement and Mrs. Almeida wanted the interest conveyed to George to be divested. Even assuming that George's promise to support was not a condition subsequent, there was a failure of consideration and, on the basis of the reported cases, the trial court had the authority and discretion to rescind and cancel the 1968 Deed.

B.

George then argues that the proper remedy was not the divestment of his interest and the vesting of it in Mrs. Almeida, but rescission and cancellation of the 1968 Deed. Further, since Harry was a co-grantor, but a non-party in the case, even rescission and cancellation would not have been proper. See part I, supra.

[18] In this case, Mrs. Almeida sought the aid of a court of equity. A "court of equity has plenary power to mold its decrees **182 in such form as to conserve the equities of all parties * * *." Fleming v. Napili Kai, Ltd., 50 Haw. 66, 70, 430 P.2d 316, 319 (1967) (quoting Baker Sand & Gravel Co. v. Rogers P. & H.

Co., 228 Ala. 612, 619, 154 So. 591, 597, 102 A.L.R. 346, 355 (1934)). See Schrader v. Benton, 2 Haw.App. 564, 635 P.2d 562 (1981). Also, "[t]he relief granted in equity is dictated by the equitable requirements of the situation, and must be adapted to the facts and circumstances of the particular case." Shinn v. Edwin Yee, Ltd., 57 Haw. at 235, 553 P.2d at 746.

In Finding of Fact No. 7 which is unchallenged, the trial court found:

> 7. On March 19, 1965, Plaintiff conveyed Lot 12-B [the *524 Property] from herself as sole owner to herself and her son Harry Almeida as joint tenants. This conveyance was undertaken in exchange for the promise of Harry Almeida that he would care for Plaintiff for the remainder of her life, but it was not intended to pass any interest in the property to Harry until Plaintiff's death. Harry Almeida subsequently informed Plaintiff that he was not going to return to Maui.

The consideration for the March 19, 1965 conveyance of a joint interest to Harry was his promise to support Mrs. Almeida. Finding of Fact No. 7 indicates a breach of the promise by Harry since his decision not to return to Maui would make it impractical for him to care for Mrs. Almeida. Thus, Mrs. Almeida had the right to have Harry's interest in the Property restored to her consensually or by judicial action. She did neither. Instead, she caused Harry to convey the Property together with her to herself and George by the 1968 Deed.

[19] Under such circumstances, the trial court could and did mold its decree to divest George's interest in the Property and vest the same in Mrs. Almeida. It was unnecessary to require Harry to join in the law suit, decree the rescission and cancellation of the 1968 Deed and order Harry to convey his interest in the Property to Mrs. Almeida.

C.

In the Findings of Fact and Conclusions of Law filed on October 20, 1981, after concluding that a judgment should be entered divesting George's interest in the Property and vesting the same in Mrs. Almeida, the trial court, in the alternative, concluded that the Property should remain in the names of the parties as joint tenants provided that Mrs. Almeida would have the beneficial interest of the Property during her lifetime and that George would pay Mrs. Almeida $250 per month from September 1, 1981. George asserts that this clearly shows that Mrs. Almeida had an adequate remedy at law and the equitable remedy of divestiture was improper.

[20] At the hearing on George's motion for reconsideration of the judgment and for amendment of findings of fact and conclusions *525 of law, the trial judge indicated that he had inserted the alternative conclusion of law for a practical purpose. He stated that Mrs. Almeida was aged and had "passed her life expectancy" and he was giving George "a chance to make up with ... his mother." Transcript at 141. However, in his affidavit, George indicated that since his monthly net income totaled $1,700 and his monthly expenses approximated $1,615, he would be unable to make a monthly payment of $250 to Mrs. Almeida. Furthermore, Mrs. Almeida rejected the court's alternative conclusion. The court's efforts were in vain.

[21] As indicated in part V-A, supra, where there has been a failure of the consideration of support for a deed, the equitable remedy of rescission and cancellation is not uncommon, especially where the grantor is aged. A money judgment award to Mrs. Almeida, who was 78 years old, upon George's representation that he was unable to pay $250 monthly, would have been an inadequate remedy at law. The trial court did not err in ordering divestiture in the judgment.

Affirmed.

END OF DOCUMENT

(Cite as: 26 Misc.2d 204, 205 N.Y.S.2d 581)

Application of Claire SHIPLEY, mother and natural guardian on behalf of Gerald Henry, Matthew Henry, Claire Henry and Theodore Henry infants, and all of said Infants By their mother, joining in this Petition, asking for leave to change their names.

Supreme Court, Special Term, Nassau County, Part I.

Sept. 14, 1960.

Proceeding on application made by four infants by their mother for permission to change infants' surname to that of their stepfather. The Supreme Court, Bernard S. Meyer, J., held that where infants aged eighteen years and four months, fifteen years and eight months, thirteen years and eight months, and eleven years and two months, were of sufficient understanding to select their surname and change in use of surname from that of their natural father to that of their stepfather had been made of their own volition, infants were competent to continue use of stepfather's name without court order and each would be free to return to the use of his natural father's surname whenever infant was satisfied that that was the proper course and father was not entitled to injunction to prevent infants using stepfather's name.

Petition by father for restraining order denied and petition for change of name denied.

[1] NAMES k20

269k20

Where application was made by four infants by their mother, for permission to change infants' surname to that of their stepfather and to drop first name of oldest infant who was named for his father, proceeding by petition and order to show cause requiring mother to cease and desist causing children to be known by any other surname than father's, to cause school and other records to be rectified, and to refrain from changing surname of any children except by order of court was correct way for father to bring on issues and two petitions would be considered together. Civil Rights Law, s 60 et seq.

[2] NAMES k20

269k20

Where application was made by four infants by their mother to change infants' surname and father in his answering papers sought an order restraining mother and stepfather from interfering with his visitation rights as fixed in a separation agreement, but no separate motion or cross motion for that relief had been made by father nor was such relief requested in father's petition for other relief, question as to visitation rights was not properly before court and would not be ruled upon. Civil Rights Law, s 60 et seq.

[3] NAMES k20

269k20

A petition for change of an infant's name should be granted if there is no reasonable objection to the proposed change and the interests of the infant will be substantially promoted by the change. Civil Rights Law, s 60 et seq.

269k20
Contentions that changing surname of children would create an impossible climate for visitation by father, would teach children deceit since they would be using a name not theirs in order to cover possible embarrassment, and that use of stepfather's name would be personally obnoxious to father were not sufficient basis to deny change if otherwise warranted. Civil Rights Law, s 60 et seq.

[5] NAMES k20
269k20
Possible adverse effect on relationship between a father and his children is a valid ground of objection to changing surname of children where father has evidenced sustained interest in children by continuing support payments and visitation and he does not unreasonably delay in objecting to the change. Civil Rights Law, s 60 et seq.

[6] NAMES k20
269k20
In determining whether surname of children should be changed from that of their natural father to that of their stepfather, after divorce and remarriage of mother, question was not which of the adults was right or wrong but what course would best serve the interests of the children.

[7] NAMES k20
269k20
In proceeding on application made by four infants by their mother for permission to change infants' surname to that of their stepfather, evidence established that granting of petition would contribute to further estrangement of children from their natural father, that such estrangement was not in best interest of children, that present estrangement was not so completely the fault of father that he should be held to have forfeited his right to interpose objection and that children were using stepfather's name of their own volition. Civil Rights Law, s 60 et seq.

[8] NAMES k20
269k20
A name change judicially effected cannot thereafter be changed except by like decree.

[9] NAMES k20
269k20
The Civil Rights Law provisions establishing a judicial procedure for change of name are in addition to, and not in substitution for, the common-law methods of change. Civil Rights Law, s 60 et seq.

[10] NAMES k20
269k20
Where parents are separated or divorced, any change in child's name brought to court's attention should be closely scrutinized to determine that it is actually the infant's own decision rather than that of the parent with whom he lives, but it is not required that common-law method of voluntary change be denied the infant.

[11] INJUNCTION k94

212k94
Where infants, aged eighteen years and four months, fifteen years and eight months, thirteen years and eight months, and eleven years and two months, were of sufficient understanding to select their surname and change in use of surname from that of their natural father to that of their stepfather had been made of their own violation, infants were competent to continue use of stepfather's name without court order and each would be free to return to the use of his natural father's surname whenever infant was satisfied that that was the proper course and father was not entitled to injunction to prevent infants using stepfather's name.

[11] NAMES k20
269k20
Where infants, aged eighteen years and four months, fifteen years and eight months, thirteen years and eight months, and eleven years and two months, were of sufficient understanding to select their surname and change in use of surname from that of their natural father to that of their stepfather had been made of their own violation, infants were competent to continue use of stepfather's name without court order and each would be free to return to the use of his natural father's surname whenever infant was satisfied that that was the proper course and father was not entitled to injunction to prevent infants using stepfather's name.

[12] NAMES k9
269k9
Although hereditary surnames are customary, that custom has never amounted to a common-law legal right.

[13] NAMES k20
269k20
In proceeding on application by four infants by their mother for permission to change infants' surname to that of their stepfather, there was a failure of proof of father's allegations that every effort was being made by mother to create impression that stepfather was natural father, that stepfather had instructed school authorities to see that children were known by his surname and that mother's action was part of a well-calculated plan to alienate the children from their father. Civil Rights Law, s 60 et seq.

****584 *205** Nathaniel Taylor, Mineola, for petitioners.

Frank J. Faruolo, Jr., Brooklyn, for respondent.

BERNARD S. MEYER, Justice.

[1, 2] This application, made by four infants by their mother and on notice to their father, seeks permission, pursuant to Civil Rights Law, Article 6, to change their surname to that of their stepfather, and in the case of the oldest infant, who is named for his father, but has used his ***206** middle rather than his first name, also to drop his first name and hereafter to use his middle name as his first name and his mother's maiden name as his middle name. The parents of the infants were married in 1941, separated in 1956 and were divorced in 1958 by a Nevada decree made in a proceeding brought by the mother and in which the father appeared. By order to show cause and petition, the father seeks an order requiring the mother to cease and desist causing the children to be known by any other surname than his, to cause school and other records to be rectified, and to refrain

from changing the surname of any of the children except by order of court. While there was no matrimonial action in New York and there is no provision in Civil Rights Law, Article 6, authorizing consideration of such a petition in a change of name proceeding, it appears that proceeding by petition and order is the correct way to bring on the issues raised by the father, Finlay v. Finlay, 240 N.Y. 429, 433-434, 148 N.E. 624, 626, 40 A.L.R. 937; People ex rel. Sisson v. Sisson, 246 App.Div. 151, 155, 285 N.Y.S. 41, 44, reversed on other grounds 271 N.Y. 285, 2 N.E.2d 660; Application of Ebenstein, Sup., 85 N.Y.S.2d 261, n. o. r.; see Galanter v. Galanter, Sup., 133 N.Y.S.2d 266, n. o. r.; People ex rel. Way v. Williams, Sup., 101 N.Y.S.2d 383, n. o. r.; Application of Bopp, Sup., 58 N.Y.S.2d 190, 195, n. o. r., and that no reason exists why the two petitions should not be considered together. A hearing has, therefore, been held on both at which both sides were given full opportunity to adduce testimony. For the reasons hereafter stated, both the petition for change of name and the petition for a restraining order are denied. In the father's answering papers on the Article 6 application, he also seeks an order restraining the mother and stepfather from interfering with his visitation rights as fixed in a separation agreement. No separate motion or cross-motion for that relief has been made nor was such relief requested in the fathr's petition. The question is, therefore, not properly before the court and will not be ruled upon.

[3, 4] Under Civil Rights Law, s 63, a petition for the change of an infant's name should be granted if (1) there is no reasonable objection to the proposed change and (2) the interests of the infant will be substantially promoted by the change. The father objects to the change because it will adversely affect his relationship with the children, will create ****585** an 'impossible climate' for visitation, teaches the children deceit since they will be using a name not theirs in order to cover possible embarrassment, and because use of the stepfather's name would be personally obnoxious ~~to~~ him. The last three reasons require little consideration; the occasions for use of a surname during ***207** visitation are so few and the practice of changing surnames so long standing and well recognized, particularly where children of a broken marriage are living with their mother who has remarried, that neither the second nor the third can be considered reasonable. Likewise, the fourth, which is purely personal is no sufficient basis to deny the change if otherwise warranted.

[5] Possible adverse effect on the relationship between a father and his children is, however, a valid ground of objection, where the father has evidenced sustained interest in the children by continuing support payments and visitation and does not unreasonably delay in objecting to the change, Application of Wittlin, City Ct., 61 N.Y.S.2d 726, n. o. r.; Matter of Epstein, 121 Misc. 151, 200 N.Y.S. 897; Nitzberg v. Board of Education, 200 Misc. 748, 104 N.Y.S.2d 421; Matter of Otis (Weiss), 204 Misc. 1073, 126 N.Y.S.2d 651; Matter of Simon, 1 Misc.2d 177, 148 N.Y.S.2d 14; In re Schultz (Ortenberg), N.Y.L.J. 11/14/57, p. 7, col. 2; see Matter of Pollack (Zipper), 2 A.D.2d 756, 153 N.Y.S.2d 282. The mother does not deny that support at the rate of $250 per month, as required by the separation agreement has been regularly paid, but says that, by his conduct prior to divorce and during visitation periods since, the father has himself alienated the children. She argues further that the relationship of the children to their stepfather is close, that he participates in school and other activities with them, that they voluntarily called him 'Dad' and began using his surname, and have in the last two years shown marked improvement from the upset children (as evidenced by stammering, or bedwetting or nervousness) they were previously, that the use of the father's surname is a constant reminder of unpleasantness, that the status achieved by the children themselves in their school, church and other relationships should be continued, and that the emotionally wellbeing and security of the children will be promoted by the change to the stepfather's surname, thus creating a cohesive family unit.

The conduct of the father alluded to is alcoholism and the constant involvement of the children in the emotional difficulties of the father. The court is satisfied from the evidence that the father's drinking was a major cause of the family breakup, that the attitudes and aptitudes of the children have been substantially improved by their new environment, and that they have a warm relationship with their stepfather and a strained relationship with their natural father. Since the warm relationship and improved environment will continue whether or not the petition is granted, it does not necessarily follow, however, that *208 the children's interest will be substantially promoted by the proposed change.

**586 [6][7][8] The court cannot say on the record before it that the natural father has not exhibited a desire to preserve the parental relationship. Nor can it ignore the effect on that relationship of the antipathy between father and stepfather, the greater material advantages which the stepfather with his vastly larger income freely gives, and the disadvantage at which the natural father is placed by his separation from and sporadic contact with the children. Much of the father's disadvantage is, it is evident from the testimony, and particularly from that of the children, of his own doing. The question, however, is not which of the adults is right or wrong, but what course will best serve the interests of the children. Since the granting of the petition in the circumstances of the instant case will, in the court's opinion, contribute to the further estangement of the children from their natural father and such estrangement is, generally, not in the best interest of children; since the court is not convinced that the present estrangement is so completely the fault of the father that he should be held to have forfeited his right to interpose objection nor that the present estrangement is beyond conciliation given an intelligent and less emotional approach on the part of the adults, and particularly on the part of the father; since the children involved in this proceeding are of sufficient age and understanding to continue the use of the stepfather's surname through exercise of the common law right hereinafter referred to to change their names and, the court finds from their testimony, are doing so of their own volition; and since a name change judicially effected apparently cannot thereafter be changed except by like decree (Civil Rights Law, s 64; Smith v. United States Casualty Co., 197 N.Y. 420, 90 N.E. 947, 26 L.R.A.,N.S., 1167; Klein v. Steel, 186 Misc. 98, 60 N.Y.S.2d 323, affirmed 270 App.Div. 806, 60 N.Y.S.2d 277; Application of Biegaj, City Ct., 25 N.Y.S.2d 85, n. o. r.), the court concludes that the nterests of the children will not be substantially promoted by granting the requested order, see In re Rounick, 47 Pa.Dist. & Co.R. 71.

[9, 10] The Civil Rights Law provisions establishing judicial procedure for change of name are in addition to, and not in substitution for, the common law methods of change, Smith v. United States Casualty Co., supra. Surnames are said not to have been used in England until the Norman conquest, Fox-Davis, A Treatise on the Law Concerning Names and Change of Name (1906), 14; Dudgeon, A Short Introduction to the Origin of Surnames (1890), 2, and to have come into general use only toward the end of the fourteenth century, after Henry VIII established *209 regulations governing the recording of births, marriages and deaths. Petition of Snook, 2 Hilt. 566, 571; In re Romm, 77 Pa.Dist. & Co.R. 481. About that time they became hereditary, Bardsley, English Surnames (1875), 3, but only by custom, Kay v. Bell, 95 Ohio App. 520, 121 N.E.2d 206; Encyclopedia Brittanica (1953), 64, and the custom has never ripened into a rule of law, Petition of Snook, supra, at page **587 572. The change could be accomplished by an Act of Parliament or by the King's license, Petition of Snook, supra, by deed-poll usually accompanied by an advertisement, Phillimore, The Law and Practice of Change of Name (1905), xxxii; 23 Halsbury's Laws of England (2d Ed.), 560, or 'as in the first instance they were arbitrarily assumed, so they could be changed at pleasure.' Halsbury, supra, at p. 556, and without legal formality, Smith v. United States Casualty

Co., supra; Petition of Snook, supra. The right of a minor to change his name without legal formality was, moreover, recognized as early as 1822 in Doe dem. Luscombe v. Yates, 5 B. & Ald. 544, 106 E.Rep. 1289 and has been recognized in California, In re Useldinger, 35 Cal.App.2d 723, 96 P.2d 958; In New Jersey, Bruguier v. Bruguier, 12 N.J.Super. 350, 79 A.2d 497; in Mississippi, Marshall v. Marshall, 230 Miss. 719, 93 So.2d 822; In Ohio, Kay v. Kay, Ohio Com.Pl., 112 N.E.2d 562; and in New York, Cooper v. Burr, 45 Barb. 9, 34; see 1953 Law Revision Commission Report, 206-213. Only the Bruguier case involved the right of an infant to make the change over the objection of her father, but Doe dem. Luscombe v. Yates, supra, which involved compliance with the provision of a trust requiring a change of name held (5 B. & Ald. 544, 556) that: '* * * a name assumed by the voluntary act of a young man at his outset into life, adopted by all who know him, and by which he is continually called, becomes, for all purposes that occur to my mind, as much and effectually his name as if he had obtained an Act of Parliament to confer it upon him.' Whether public interest in the maintenance of family harmony and parental authority will necessitate denial of the right of change to an infant living with both parents or with a sole surviving parent, see 1953 Law Revision Commission Report, 213, need not now be determined. Where the parents are separated or divorced, policy considerations suggest that any change brought to a court's attention be closely scrutinized to detemine that it is actually the infant's own decision rather than that of the parent with whom he lives, but do not require that the common law method of voluntary change be denied the infant, Note, 44 Cornell L.Q. 144, 149.

[11] The Luscombe case does not indicate when the name change there involved occurred except that it was 'before he became of age'; the Bruguier case, only that the infant against whom ***210** an injunction was sought was of high school age. The change recognized in the Useldinger case had been made at age 12, and that involved in Cooper v. Burr, supra, at 'the age of nine or ten years.' The Court of Appeals has, however, held that a child twelve years of age in the custody of one parent is, if his testimony reveals him to be old enough to testify intelligently and the evidence shows it to be in the infant's best interests to permit him to do so, competent, notwithstanding the provisions of an ****588** earlier separation decree and the objection of the other parent, to select the religion he chooses to follow, Martin v. Martin, 308 N.Y. 136, 123 N.E.2d 812; see also Hehman v. Hehman, 13 Misc.2d 318, 178 N.Y.S.2d 328; Booke v. Booke, 207 Misc. 999, 141 N.Y.S.2d 580. Further, in some change of name cases, the court, without specifying whether it meant legal age or only the mental capacity to make an intelligent choice, noted that the child could make the change when he 'reached a mature age', Matter of Pollack (Zipper), supra [2 A.D.2d 756, 153 N.Y.S.2d 283]; or when 'capable of selecting a name for himself,' Matter of Epstein, supra [121 Misc. 151, 200 N.Y.S. 898]; or when 'competent to make a choice,' Matter of Cohn, 181 Misc. 1021, 50 N.Y.S.2d 278, 279; or 'when he has attained a certain maturity in understanding the circumstances,' Matter of Baldini, 17 Misc.2d 195, 183 N.Y.S.2d 416, 417; see also 1953 Law Revision Commission Report, 208- 210, and in two change of name cases concerning children over 16, it has been recognized that the child's preference should normally be decisive, Application of Harris, Sup., 43 N.Y.S.2d 521, n. o. r. (boy of 18); Application of Horn, Sup., 21 N.Y.S.2d 453, n. o. r. (boy of 16); cf. Application of Wittlin, supra. The infants involved in this proceeding are now 18 years and 4 months, 15 years and 8 months, 13 years and 8 months, and 11 years and 2 months of age, and the court is satisfied from their testimony that they are of sufficient understanding and that the change has been made of their own volition. On analogy to the religion cases above referred to and on the basis of the name change cases cited, the court holds that the infants are competent to continue the use of the names referred to in their petition without court order. Each will also be free to return to the use of his

father's surname whenever he is satisfied that this is the proper course. Were it not the law that the infants can exercise their own individual volitions in using the surname of either the ather or the stepfather, the court would be constrained to grant the order under Civil Rights Law, s 63. Since it is the law, clearly no injunction would issue against the children to prevent their so doing under the circumstances of this case. It is, therefore, unnecessary to consider the further argument *211 advanced on behalf of the children that their common law right, because constitutionally protected, cannot be enjoined.

But, the father argues a number of cases have referred to the right of a father to have his child bear his surname, Schoenberg v. Schoenberg, Sup., 57 N.Y.S.2d 283, n. o. r., modified 269 App.Div. 864, 1048, 56 N.Y.S.2d 47, 59 N.Y.S.2d 280, affirmed 296 N.Y. 583, 68 N.E.2d 874; In re Lyons, Sup., 19 N.Y.S.2d 839, n. o. r.; DeVorkin v. Foster, Sup., 66 N.Y.S.2d 54, n. o. r.; Young v. Board of Education, Sup., 114 N.Y.S.2d 693, n. o. r.; Steinbach v. Steinbach, Sup., 119 N.Y.S.2d 708, n. o. r.; Matter of Baty, N.Y.L.J. 8/3/56, p. 6, col. 7; Matter of Baldini, supra, and that right has been protected by restraining order directed against the mother, Schoenberg v. Schoenberg, supra; DeVorkin v. **589 Foster, supra; Application of Ebenstein, supra; Matter of Cohn, supra; Steinbach v. Steinbach, supra; Galanter v. Galanter, supra; In re Schultz (Ortenberg), supra, or against the Board of Education, Young v. Board of Education, supra; Nitzberg v. Board of Education, supra; Witover v. Board of Education, N.Y.L.J. 1/3/57, p. 10, col. 6. Therefore, it is argued an injunction order should issue in this case against the mother.

[12] Only the Steinbach case refers to the legal right of the father; all of the others refer to a 'natural,' 'fundamental,' 'primary' or 'time honored' right. Without doubt hereditary surnames are customary, but as we have seen that custom as never amounted to a common law legal right. Prior to the 1953 amendment of Civil Rights Law, Article 6, the consent of both parents to the change of name of an infant under sixteen years of age was required, 1953 Law Revision Commission Report 193-205, and see the annotation in 53 A.L.R.2d 914, 915. The restraining orders granted were predicated on that requirement, either explicitly, Schoenberg v. Schoenberg, supra, particularly 57 N.Y.S.2d at page 284; Application of Ebenstein, supra; Steinbach v. Steinbach, supra; Galanter v. Galanter, supra; or implicitly, Matter of Cohn, supra; DeVorkin v. Foster, supra; Nitzberg v. Board of Education, supra; Young v. Board of Education, supra; In re Schultz, supra. In only two cases, In re Schultz, supra, and Witover v. Board of Education, supra, have restraining orders issued since the 1953 amendment. In the Schultz case the pre-1953 cases cited above were cited as authority without discussion; in the Witover case no authorities were cited, but enforcement of the order directed to the Board of Education was suspended to permit the mother to make formal *212 application on notice to the father for change of the child's name. The court concludes that, because of the 1953 amendment, issuance of a restraining order against the mother cannot be predicated on the authorities cited.

[13] Further doubt concerning the propriety of issuing such an order arises from the continued refusal of the Court of Appeals to recognize protection of a name as a proper subject for injunction in actions between a wife and her husband's paramour, Baumann v. Baumann, 250 N.Y. 382, 165 N.E. 819; Somberg v. Somberg, 263 N.Y. 1, 188 N.E. 137; Lowe v. Lowe, 265 N.Y. 197, 192 N.E. 291. Even if it be assumed that that court, when presented with the question, will distinguish wife-paramour cases and follow the apparent trend toward use of injunctive process between parents to prevent the unilateral change of a child's name, Mark v. Kahn, 333 Mass. 517, 131 N.E.2d 758, 53 A.L.R.2d 908; Margolis v. Margolis, 338 Mass. 416, 155 N.E.2d 177; Reed v. Reed, Okl., 338 P.2d 350; Sobel v. Sobel, 46 N.J.Super. 284, 134 A.2d 598; note 53 A.L.R.2d 914,

there is no basis for issuance of such an in junction in the present case, Mark v. Kahn, supra. The father's proof **590 failed to substantiate the claim that the change of name was brought about by the mother rather than the children. In fact, on the whole proof, the court finds that the children are registered at school under the father's name, but through their own acts and choice are generally known in school, among their friends and in the environs of their present residence by the surname of the stepfather. Though the father's petition alleged that 'every effort was being made by Respondent' (the mother) to create the impression that the stepfather is the natural father (Par. 14) and that the stepfather had instructed the school authorities to see that the children were known by his surname (Par. 16) and that the mother's action 'is part of a well-calculated plan to alienate the children' from the father, there is a failure of proof to sustain these allegations.

The petition by the father for a restraining order will, therefore, be denied; on the petition for change of name, the order to be entered denying the petition may recite as one of the reasons for such denial the finding of the court that the infants are of sufficient age and intelligence to make the requested change without judicial proceedings. No costs will be allowed in either proceeding. The disposition made will give the father the opportunity, with the help of church or psychiatric counseling, to re-establish his relationship with the children, see Application of Proman, City Ct., 63 N.Y.S.2d 83, n. o. r. If he makes that effort, it will be incumbent upon the mother and stepfather, in the best interests of the children, to foster the relationship. The disposition is, however, without prejudice to such further application *213 as any of the parties, on a showing of changed circumstances, may see fit to make.

To protect the interests of the infants, this decision will be published under fictitious names and the file will be ordered sealed.

Settle order on notice.

11 Fla. L. Weekly 2112
(Cite as: 495 So.2d 277)

Warren J. AZZARA, Jr., Appellant/Cross-Appellee,
v.
Jane WALLER, Appellee/Cross-Appellant.

No. 85-2934.

District Court of Appeal of Florida,
Second District.

Oct. 3, 1986.

Mother petitioned to change surname of child to that taken by mother upon remarriage, and natural father counterclaimed seeking injunction. The Circuit Court, Pasco County, Wayne L. Cobb, J., denied petition in counterclaim, and appeal and cross appeal were taken. The District Court of Appeal, Lehan, J., held that best interest of eight-year-old daughter had been served by mother, whose marriage with father had been dissolved, in allowing child unfettered discretion to use surname of either mother or father, and thus, no decision would be made as to whether child would bear surname of father or surname taken by mother upon mother's remarriage.

Affirmed.

DIVORCE⚷ 313.1
134⚷313.1
Formerly 134k313
Best interest of eight-year-old daughter had been served by mother, whose marriage with father had been dissolved, in allowing child unfettered discretion to use surname of either mother or father, and thus, no decision would be made as to whether child would bear surname of father or surname taken by mother upon mother's remarriage.

***277** Paul F. Probst, Jr. of Larson, Conklin, Stanley, Probst & Gassman, P.A., Belleair Bluffs, for appellant/cross-appellee.

Charles D. Waller of Waller & Hersch, Dade City, for appellee/cross-appellant.

LEHAN, Judge.

This is an appeal and cross appeal from the trial court's decision not to decide at this time whether the eight-year-old daughter of a dissolved marriage should bear the surname of her natural father or the surname taken by the mother upon the mother's remarriage. The mother has primary custody of the child. The child lives with her mother and stepfather.

The mother filed a petition to change the surname of the child to that taken by the ***278** mother upon her remarriage. The natural father counterclaimed to enjoin the mother from allowing or encouraging the child to be known by any surname other than his The trial court's final judgment denied both the petition and the counterclaim.

The natural father has appealed, and the mother has cross appealed Upon consideration of the extensive record, the well-presented arguments for both sides, and the trial judge's findings and conclusions, we affirm.

The final judgment reads as follows.

Final Judgment

This is an action brought by the mother of an eight year old girl to change the child's surname to that of the mother's husband. The child's father vigorously objects and demands that the Court enjoin the mother from requiring or encouraging the child to use the mother's surname.

The subject of this action, Mary Beth, was born on December 24, 1977, to Warren Joseph Azzara, Jr., and Jane Huckaby Azzara, his wife. Mr. and Mrs. Azzara were divorced on April 10, 1981, with Mrs. Azzara receiving primary custody of Mary Beth. On December 25, 1981, Mrs. Azzara married Charles Waller. Mr. Waller is a prominent attorney in Dade City. Mrs. Waller is a member of the very prominent Huckaby family of Dade City. Mr. Azzara currently lives in New York.

The law by which this Court must be guided in deciding this case appears clear. The Court should order a change of a minor's surname over the objection of one parent only where the evidence affirmatively shows that such change is necessitated by the welfare of the child. Lazow v. Lazow, 147 So.2d 12 (Fla. 3d D.C.A.1962)

BILENKIN
v.
BILENKIN.

Court of Appeals of Ohio, Montgomery County.

Nov. 26, 1945.

[1] CONTEMPT 30
93 30
A court has inherent, as well as statutory power to punish for contempt in disobeying court's order, rule, judgment, or command. Gen.Code, § 12137.

[2] DIVORCE 308
134 308
The common pleas court had no authority to vacate its order for support of divorced parents' minor child by father, in absence of claim that order was made without jurisdiction or induced by fraud or mistake.

[3] CONTEMPT 28(1)
93 28(1)
A divorced husband's motion to vacate order for support of his minor child, on grounds that child's mother deliberately changed child's surname and violated court order requiring her to deliver child into father's possession, stated no defense to charge of father's contempt of court in disobeying support order. Gen.Code, § 12137.

[3] DIVORCE 311(2)
134 311(2)
Formerly 134k311
A divorced husband's motion to vacate order for support of his minor child, on grounds that child's mother deliberately changed child's surname and violated court order requiring her to deliver child into father's possession, stated no defense to charge of father's contempt of court in disobeying support order. Gen.Code, § 12137.

[3] NAMES 20
269 20
A divorced husband's motion to vacate order for support of his minor child, on grounds that child's mother deliberately changed child's surname and violated court order requiring her to deliver child into father's possession, stated no defense to charge of father's contempt of court in disobeying support order. Gen.Code, § 12137.

[4] DIVORCE 313.1
134 313.1
Formerly 134k313
Under evidence denial of divorced husband's motion to restrain his former wife from registering their minor daughter in school, Sunday school, and other places under surname of wife's second husband, as she had done from time when she moved with child and such husband to their home hundreds of miles from that of child's father, was not error.

[4] NAMES 20
269 20
Under evidence denial of divorced husband's motion to restrain his former wife from registering their minor daughter in school, Sunday school, and other places under surname of wife's second husband, as she had done from time when she moved with child and such husband to their home hundreds of miles from that of child's father, was not error.

Proceeding by Beatrice L. Bilenkin against Gilbert Bilenkin for contempt in disobeying a court order to make monthly payments for the support of the parties' minor child. From an order finding defendant in contempt of court and overruling his motions to vacate the support order and restrain plaintiff from registering the child under a different surname than defendant's in school, Sunday school, and other places, defendant appeals.--[Editorial Statement.]

Affirmed.

***481 **84** Landis, Ferguson, Bieser & Greer, of Dayton, for plaintiff- appellee.

Jacobson & Durst, of Dayton, for defendant-appellant.

HORNBECK, Presiding Judge.

This is an appeal on questions of law from an order of the Court of Common Pleas, Montgomery County, Division of Domestic Relations, which found that the defendant was in contempt of court for failure to observe a former order of the court requiring the payment of $50 a month for the support of his child,

Barbara Bilenkin, which arrearage at the time of the filing of the charge was in excess of $500. The order further recited the overruling of a motion *482 of the defendant to vacate the former order of the court relative to payments to be made by the defendant to the plaintiff for the support of Barbara Bilenkin, and a motion of defendant for an order restraining the plaintiff from registering Barbara Bilenkin under the name of Barbara Salesky in school, Sunday school or any other place, etc.

The parties in this cause were formerly husband and wife and a decree of divorce was awarded to the plaintiff for the agression of the defendant. The custody of the two minor children of the parties was awarded to the plaintiff and at the time of the entering of the decree of divorce the court approved and adopted an agreement wherein the defendant agreed to pay to the plaintiff for the support of each of the children, Barbara and Gilbert, Jr., the sum of $50 per month. Prior to the institution of the contempt proceedings, Gilbert, Jr., the son, having reached the age of ten years had elected to choose his father as his guardian and was living with his father.

**85 The plaintiff remarried to Bernard L. Salesky, who with the plaintiff and Barbara were living at Elkins Park, Pennsylvania, a suburb of Philadelphia.

The contempt charge asserted that the defendant was in arrears in payment of support money for Barbara in the sum of $500.

The defendant did not orally or in writing enter any formal denial of the charge of contempt but at about the time of the hearing on the contempt charge filed two motions, the first of which was for vacation of the support order for two reasons, first, that 'plaintiff has deliberately changed the name of Barbara Bilenkin to Barbara Salesky' and, second, because the plaintiff has deliberately violated the court order requiring her to deliver the child into the possession of the defendant. The second motion, with which was incorporated an *483 affidavit supporting the second ground of the first motion, prayed the court for an order restraining plaintiff from registering said child, as Barbara Salesky, either in the school, Sunday school, or at any other place. The court determined the contempt charge and the motions as heretofore stated and this action is made the subject of this appeal.

[1] The inherent power of a court as well as statutory authority recognizes 'Disobedience of [an] * * *, order, rule, judgment, or command of a court' as contempt. G.C. § 12137.

[2] The first motion was not a defense to the contempt charge unless the court should vacate the support order. This the court had no authority to do it not being claimed that the order was made without jurisdiction or induced by fraud or mistake. Tullis v. Tullis, 138 Ohio St. 187, 34 N.E.2d 212, 213. This case holds that where a contract for support for minor child entered into by the parties to a divorce proceeding 'is specifically approved by the court and made a part of the decree,' it 'may not, in the absence of fraud or mistake, be subsequently modified by the court so as to lessen the amount of support for such minor child.' A fortiori, if the court may not lessen the amount of such contract it may not determine the contract to be invalid.

[3] Neither of the two grounds of the motion was a defense to the contempt charge because manifestly neither affected the material question involved, namely, whether or not the defendant had violated an order of the court. Nor was a citation requested because of the claimed violation of the visitation order.

Of course, the fact that the court could not modify nor vacate the support decree because it was an embodiment of the contract between the parties, would not have prevented the finding that the defendant was not *484 in contempt because to support the charge the Court must have further found that the violation was wilful. But this element was not in dispute, nor is there anything to indicate that the defendant was unable to comply with the order.

The two grounds of the first motion were not defenseive because the violation by the plaintiff of a court order, if true, afforded no justification for the defendant's violation of an order directed to him. The Court could, in determining the punishment of defendant by reason of his violation of the support order, have given consideration to the question whether or not the plaintiff also had violated an order, but the Court found that the plaintiff had not violated any order. Neither ground of the motion to vacate afforded any reason to support a modification or a vacation of the support order even though the Court had the power

to vacate it.

[4] The second motion sought an order restraining the plaintiff from using the name of Barbara Salesky for Barbara Bilenkin, the child of the parties. The plaintiff, nor her husband, may not accomplish a change in the name of the child by their acts in registering her in school, Sunday school and other places as Barbara Salesky. Under the facts appearing we may not hold that the Court committed prejudicial error in refusing to grant the relief sought.

Judge Nicholas in his written opinion which we have before us gives sufficient reasons, in our judgment, to support his refusal to compel the plaintiff to carry the child's name as Barbara Bilenkin in school, Sunday school and other places. The trial judge points out that this practice of registering the minor daughter of the parties in the name of Salesky had been followed from the time that the plaintiff had moved with her husband to their present residence. The home of the child is hundreds of miles removed from that of her father and it does not reasonably appear that he will *485 be materially affected, one way or the other, by reason of the fact that **86 his child there carries the name of Salesky. On the other hand, it may be very embarrassing and the source of some humiliation to the daughter if at this time the plaintiff should be required to no longer carry the daughter's name as heretofore known among her associates. Had the request been made of the Court when the facts first came to the attention of the defendant, it would present a different and more difficult question. The ruling on the motion, when made, was not prejudicially erroneous.

The order appealed from will be affirmed.

MILLER, and WISEMAN, JJ., concur.

END OF DOCUMENT

BINFORD
v.
REID.

No. 33183.

Court of Appeals of Georgia, Division No. 1.

Jan. 27, 1951.

Rehearing Denied Feb. 9, 1951.

Proceeding by Dorothy Lowe Reid against H. A. Binford, Jr., to change the name of Henry Arthur Binford, III, to George Lowe Reid. The Superior Court, Fulton County, Claude D. Shaw, J., rendered judgment granting the application and H. A. Binford, Jr., brought error. The Court of Appeals, Worrill, J., held that granting divorced mother's application to change name of child so that child's surname would be surname of mother's subsequent husband was not abuse of discretion, where mother remarried when child was less than one year old, and child lived with mother and subsequent husband and children born of subsequent marriage, and child was known at home and school by surname of subsequent husband.

Judgment affirmed.

[1] NAMES ⇐ 20
269k20
The action of Superior Court in granting or refusing a proper application to change the name of a person is based solely on sound legal discretion. Ga.Code Ann. § 79-501.

[2] NAMES ⇐ 20
269k20
Granting divorced mother's application to change name of child so that child's surname would be surname of mother's subsequent husband was not abuse of discretion, where mother remarried when child was less than one year old, and child lived with mother and subsequent husband and children born of subsequent marriage, and child was known at home and school by surname of subsequent husband. Ga.Code Ann. § 79-501.

**345 *281 Alston, Foster, Sibley & Miller and Francis G. Jones, Jr., all of Atlanta, for plaintiff in error.

Hugh Howell, Jr. and Heyman, Howell & Heyman, all of Atlanta, for defendant in error.

**346 Syllabus Opinion by the Court.

*280 WORRILL, Judge.

[1, 2] The action of the Superior Court in granting or refusing a proper application to change the name of a person is based solely on a sound legal discretion, and where upon the hearing of the application of Dorothy Lowe Reid made under the provisions of Chap. 79-5 of the Code, § 79-501, Ga.Code Ann.Supp., to change the name of the applicant's minor son from 'Harry Arthur Binford, III,' to 'George Lowe Reid', it appears that the applicant is the divorced wife of the objector, Harry Arthur Binford, Jr., that Harry Arthur Binford, III, was born on September 18, 1945; that petitioner separated from the objector in 1946, obtained her divorce and in July of that year when the said Harry Arthur Binford, III, was less than one year old married William Archer Reid; that under the terms of the divorce decree granted the applicant she has sole custody of the child with the right of visitation in the objector, and that the objector pays $50 per month for the support of the said child and where the evidence showed that the said Harry Arthur Binford, III has been called by his mother, step-father and friends, 'Buddy Reid', since before he was able to walk or talk, and *281 goes by that name, is registered in kindergarten, and is known to his playmates and acquaintances as 'Buddy Reid', and that the applicant feels that it would be for the best interest of the child to avoid embarrassment and confusion to change the name so that his surname would be the same as his mother's, and the same as his sister's and brother's surname, born of the second marriage; the trial judge did not abuse his discretion in granting the application and in changing the name of the child to 'George Lowe Reid', and in thereafter overruling the motion for a new trial on the general grounds.

(Cite as: 31 Ohio Misc. 195, 287 N.E.2d 833)

In re Adoption of McCOY.
In re Change of Name of McCoy.

Nos. 24353, 24354, 24630 and 24631.

Court of Common Pleas of Ohio, Pickaway County, Probate Division.

March 14, 1972.

Proceeding by stepfather to adopt wife's children and proceeding for change of children's name. The Common Pleas Court of Pickaway County, Cline, J., held that where divorce decree between natural parents provided that mother would assume financial responsibility for the children and imposed no obligation upon father for their support, father's failure to pay support was not the wilful failure to perform a legal duty so long as mother was able to provide support, and adoption of children should not be granted without father's consent. The court also held that children's application to change their names to that of their stepfather in order to avoid social difficulties would be granted.

Adoption denied and change of name granted.

[1] ADOPTION⚿ 7.4(4)
17⚿7.4(4)
Where divorce decree between natural parents provided that mother would assume financial responsibility for the children and imposed no support obligation upon father, father's failure to pay support was not the wilful failure to perform a legal duty so long as mother was able to provide the required support, and adoption of children by stepfather could not be granted without consent of natural father. R.C. § 3107.06(B)(4).

[2] NAMES⚿ 20
269⚿20
Where adoption of children by stepfather was denied by reason of natural father's refusal to consent to the adoption, and children were predominantly known in their personal activities by their stepfather's name, children's application to change name to that of the stepfather to avoid social difficulties would be granted. R.C. § 2717.01.

***195 **834** Richard W. Penn, Circleville, for petitioner.

John A. Carnahan, Columbus, for Gene Lamar Lawter (father of child).

CLINE, Judge.

ADOPTION PROCEEDING

This case concerns the adoption of Michael Robert Lawter, Case No. 24353, and John Robert Lawter, Case No. 24354, wherein the petitioner is step-parent of said children by reason of his marriage to the natural mother. The natural mother, Mrs. Robert McCoy, signed a consent to the adoption of both boys by her husband Dr. McCoy. The adoption is contested by the father who denies having wilfuly failed to properly support the children for a period of more than two years immediately preceding the filing of the petition.

***196** The evidence indicated that the natural father had made no payments for the support of the children and that he had adequate earnings to have contributed to their support had he elected to do so.

Mr. Lawter, the father of the boys, stated that he had continued to carry medical insurance required by the Michigan Decree, and it was stipulated by all parties that no request for child support was made to the father by Mr. or Mrs. McCoy.

The parties, Mr. Lawter and the new Mrs. McCoy, were divorced in 1962 in Michigan where the decree provided as follows:

'It is Further Ordered, Adjudged and Decreed that the plaintiff, Jean Lawter, assume the financial responsibility for caring for the minor children of the parties hereto until such time as they attain the age of eighteen years or finish their high school education, whichever shall occur later. Further, that plaintiff, Jean Lawter, will carry Blue-Cross, Blue-Shield Insurance on the minor children so long as she is employed and able to carry said insurence on a group plan, then it is Ordered, Adjudged, and Decreed that defendant will carry Blue-Cross, Blue-Shield Insurance on the minor children of the parties until such time as they attain the age of eighteen (18) years or finish their high school education, whichever shall be the later.' ****835** (Case

No. 73288, Circuit Court, Genesee County, Michigan.)

Both boys expressed a desire to be adopted. The father visited the children with short visitations on several occasions and visited 8 days in 1969 and an hourly visit in January of 1970, but wrote no letters or cards to the boys during 1971. The father purchased some limited clothes for the boys at Christmas time in prior years, but he gave the boys no birthday gifts. The father stated that he carried Blue-Cross Insurance, but offered no other evidence to substantiate this fact. The mother, Mrs. McCoy, stated she also has carried such insurance. The father remarried in 1964 and has two children by this marriage. It was further stipulated that the father had means to support said children with earnings of approximately $2000.00 a month.

*197 The question presented is whether the step-father may adopt the two sons of his wife over the objection of the natural father where the facts indicate that the Michigan divorce decree requires the mother to 'assume the financial responsibility for caring for the minor children of the parties hereto until such time that they assume the age of 18 years or finish their high school education, whichever one occurs later,' and thereafter the father paid no support for the children, now residents of Ohio. The Ohio adoption statute provides:

R.C. s 3107.06(B)(4) '* * * Proof of failure to properly support and maintain the child for a period of more than two years immediately preceding the filing of the petition shall be prima facie evidence of willful failure to properly support and maintain the child. The consent of a parent found by the court to have wilfully failed to properly support and maintain the child for such period shall not be required.'

The Ohio courts have not passed on this question directly, although several cases may be noted:

1. 'Where a couple petition for adoption of their grandson, who has lived in their home during his mother's separation and divorce from his father, and in their custody since her death, claiming that the consent of the father is not required because of willful failure to support the child for more than two years immediately preceding filing the petition, as specified in Section 3107.06, Revised Code, the burden of proving such wilful failure is not sustained by the evidence that the petitioners, financially able to support the child without hardship, had never requested any payment from the father, although he had told them on numerous occasions to call him if they needed any money for the boy's care, and he did maintain an interest otherwise in his son's welfare, even seeking to have the boy live in his own home.' In re Adoption of Wright, 15 Ohio Misc. 354, 240 N.E.2d 923, 44 O.O.2d 509.

2. 'A parent may be found to have 'willfully failed' to support within the meaning of Section 3101.06, Revised Code, when such parent knowing of the duty and being able to provide such support voluntarily and intentionally fails to do so.' In *198 re Adoption of Lewis, 8 Ohio St.2d 25, 222 N.E.2d 628, approving In re Adoption of Biddle, 168 Ohio St. 209, 152 N.E.2d 105.

3. Consent and Wilful Failure to Support. Adoption by a great aunt who had had care of 10 year old child for 9 years is involved. The question was whether the payment of $320 over the two year period prior to hearing by a father who had total earnings of about $10,000 during that period, with a wife and mother of this child (had) deserted and her present whereabouts was unknown. Held: The above facts constitute wilful failure to support for the required period and the parents consent is not necessary. In re Adoption of Corey, Ohio Prob. 182 N.E.2d 75, 88 Ohio Law Abst. 186.

4. A petition for adoption was granted over the objection of the mother of the child. The evidence disclosed that no money **836 was ever offered for the support of the child by the appellant but the appellant had sent Christmas presents and had visited the child approximately a dozen times from 1946 to the date of the proceeding. Held: The Probate Court's judgment granting the adoption was affirmed by the Court of Appeals, holding that where the parents had refused to support the child except for occasional Christmas gifts, such parents had 'willfully failed to properly support and maintain' such child and therefore the consent of such parent to the adoption was not required. In re Krisher Adoption, 107 Ohio App. 109, 157 N.E.2d 123.

5. 'In re Adoption of Wedl, Ohio Prob., 114 N.E.2d 311, 65 Ohio Law Abst. 231, the second paragraph of the headnotes read as follows: '2. 'Wilful' as used in

subparagraph (B)(4) of s 8004-6, General Code, in the phrase 'wilfully failed to properly support and maintain' means 'intentional,' or an 'intentional omission of a duty.'" (Emphasis supplied.)

The courts of other states have been confronted with this problem, but most of the statutes state 'abandon and or willfully fail to support.' They have said in many cases that 'wilfully fail to support' is abandonment. Some of the cases disposing of problems similar to the instant case are as follows:

'In an adoption proceeding, consent of a parent not having custody is required when his right to custody was *199 not lost through a divorce decree within the meaning of Minn.St. 259.24, subd. 1(b), and the evidence of his parental conduct prior to and subsequent to an order modifying the decree relieving him of support and forbidding all visitation of or contact with his minor son is not sufficient to support an express or implied finding of parental unfitness justifying a termination of his parental rights.' Eggert v. Van De Weghe, 279 Minn. 31, 155 N.W.2d 454.

'Mother and stepfather filed a petition, which was opposed by father, for adoption of daughter. The County Court of Macon County, Daniel H. Dailey, J., entered judgment adverse to father, and he appealed. The Appellate Court, Reynolds, J., held that where mother obtained divorce from father and custody of their daughter, and divorce decree did not require father to contribute to support of daughter, and father was ordered by mother and stepfather to stay away from daughter, father was not guilty of 'abandonment' or 'desertion' of daughter within meaning of adoption statute, and mother and stepfather, whom the mother had married, were not entitled to adopt the daughter without father's consent.' Walpole v. Songer, 5 Ill.App.2d 362, 125 N.E.2d 645.

'* * * that mother did not ask him for support and that her present husband stated that he did not want father's support, was insufficient to sustain a finding that father wilfully failed to maintain * * *.' Nevelos v. Railston, 65 N.M. 250, 335 P.2d 573.

'Adoption proceeding by remarried mother's new husband, wherein divorced father did not consent. The Circuit Court, First Circuit, City and County of Honolulu, Gerald R. Corbett, J., granted the adoption petition on ground that divorced father had abandoned the child for six months prior to filing of the petition, and the father appealed. The Supreme Court, Mizuha, J., held that the father, a New York City resident who was separated from his child because of Florida divorce decree granting custody to the mother without directing father to make support payments and who did not support the child but sent him various cards and gifts during the various holidays of each year *200 throughout the separation, had not 'abandoned' the child within statute requiring written consent to adoption by each living legal parent who has not abandoned the child for a period of six months. Reversed with direction to dismiss petition.' In Matter of Adoption of a male minor child, 50 Haw. 255, 266, 438 P.2d 398.

**837 'Proceeding by stepfather to adopt daughter of his wife wherein natural father objected. The Circuit Court . . . entered order granting adoption and natural father appealed. The District Court of Appeal . . . held that where wealthy wife, under separation agreement, agreed to defray expense of daughter's support and maintenance and to save natural father, who was a medical student, harmless therefrom, father showed a desire to have daughter with him during summer as provided in agreement, father was visited by daughter for three years, and father sent letters, holiday cards, gifts, and photographs regularly to daughter, there was not an abandonment of daughter by father, even though he had not made any support payments, and stepfather was not entitled to adopt daughter.' Prangley v. Comerford, Fla.App., 122 So.2d 423.

'Adoption proceedings by step-father. From judgment . . . granting leave to step-father to adopt minor child, natural father appealed. The Court of Civil Appeals . . . held that there natural father of child whose custody was awarded to mother by divorce decree was elderly, nearly blind and destitute, and was unable to earn money or a salary but had made a number of small contributions to the support of his child, trial court's findings that the natural father had failed to contribute to the support of his minor child for more than two years commensurate with his ability was so clearly against the great weight and preponderance of evidence as to be manifestly wrong and unjust. Judgment reversed and cause remanded.' In re Adoption of Payne, Tex.Civ.App., 301 S.W.2d 194 Spraggins, La.App., 234 So.2d 462.

'Where divorce decree awarding custody of minor children to mother provided that father was to be relieved of any financial responsibility for support and maintenance *201 of the children, children could not be adopted by stepfather without father's consent even though father was non-resident and had not paid any child support in more than one year since custody was awarded to mother.' In re Spraggins, 234 So.2d p. 462.

[1] Since there was no legal obligation to support the children imposed by the Michigan divorce court, the failure to pay support was not the willful failure to perform a legal duty so long as the mother was able and willing to provide the required support, and the adoption cannot be granted without the consent of the father. The court finds that the applicant, Mr. McCoy, would be a very suitable and proper person to adopt Michael and John and that both boys desire the adoption. The court further finds that it would be to the best interest of said children for said adoption to be approved, but the court feels that said approval cannot be made over the objection of the father under the present statutory requirements.

Adoption denied.

CHANGE OF NAME PROCEEDING

It was stipulated and agreed between the parties that the evidence offered in Case Nos. 24353 and 24354 should be considered evidence in the above styled cases.

The facts, therefore, are that the mother and father of applicants were divorced in Michigan in 1962, that the mother was given custody and assumed the obligation of support. The father was given visitation rights which were used to a limited degree.

The father had means to pay support, but no being obligated to do so, elected not to pay any support.

[2] The applicants minors have had extensive difficulty in school and among their friends as to whether their names were Lawter or McCoy. Since their stepfather, **838 Dr. McCoy, *202 always accompanies them in their sports and personal activities, they are predominately known as McCoys

The change of name statute is as follows:

'A person desiring to change his name may file a petition in the probate court of the county in which he resides, setting forth that he has been a bona fide resident of such county for at least one year prior to the filing of the petition, the cause for which the change of name is sought, and the new name asked for. Upon being satisfied by proof in open court, of the truth of the facts set forth in the petition, that there exists reasonable and proper cause for changing the name of the petitioner, and that notice of the intended application has been given by one publication in a newspaper of general circulation in such county at least thirty days prior to the filing of the petition, the court may order such change of name.

'When such application is made by or on behalf of a minor under the age of twenty-one years, the consent of both living, legal parents of said minor shall be filed or the matter shall be set for hearing on a day certain, and any such parent not consenting shall be given notice of the hearing upon such application in the manner provided by 2101.26 of the Revised Code.' (S. 83 Eff. 9-24-63 R.C. s 2717.01.)

It is the finding of the court that the applicants are residents of Pickway County, Ohio, that all requirements as to notice and that statutes have been complied with; that this court has jurisdiction in said matter; that it would be for the best interests of the complainant applicants that their request to change their names to Michael Robert McCoy and John Robert McCoy be granted.

Entries in compliance with this and the opinion in case Nos. 24353 and 24354 will be submitted.

Change of name granted.

END OF DOCUMENT

(Cite as: 112 Ill.App.3d 725, 445 N.E.2d 951, 68 Ill.Dec. 307)

In re the MARRIAGE OF Vicki OMELSON, Now Nichols, Petitioner, and Lori Omelson, Petitioner herein, by and through Vickie Nichols, her mother and next friend, Petitioner-Appellee,

and

Robert G. Omelson, Respondent-Appellant.

No. 82-45.

Appellate Court of Illinois,

Fifth District.

Feb. 18, 1983.

Mother filed petition for change of surname of child from that of mother's ex- husband, who was father of child, to that of mother's new husband. The Circuit Court, St. Clair County, Dennis Jacobsen, J., found that best interests of child would be served by name change, and entered judgment accordingly. Father appealed. The Appellate Court, Jones, J., held that: (1) to extent that paternal right to have children bear father's surname recognizes father's interest in maintaining his relationship with his child for their mutual benefit, it is highly relevant in name change proceeding, and (2) where father maintained active interest in child, supported her and had committed no wrong toward her, best interest of child would be served by denying petition for name change, awaiting her maturity, and leaving name change decision to her.

Reversed.

Harrison, P.J., specially concurred and filed opinion.

[1] NAMES k20

269k20

Best interest of child must govern determination whether or not to grant a change of name. S.H.A. ch. 96, P 1 et seq.

[2] NAMES k20

269k20

Although petition for change of name was brought in name of minor child, where child was of such tender years that she could have no independent judgment in the matter and would be wholly subject to suggestion and desire of mother, Appellate Court would regard proceeding as instituted and prosecuted by mother. S.H.A. ch. 96, P 1 et seq.

[3] INFANTS k77

211k77

There should be no conflicting interests between an infant and the party representing him.

[4] NAMES k20

269k20

In determining whether change of name is in best interest of a child, it is well to consider whether interests of others are sought to be served by the proceeding. S.H.A. ch. 96, P 1 et seq.

[5] DIVORCE k310

134k310
Even if change of name was granted to minor child, who lived with her mother and mother's new husband, child's father would be required to continue to support and educate child, extending through college. S.H.A. ch. 40, P 513.

[6] NAMES k20
269k20
To extent that paternal right of father to have his children bear his surname recognizes father's interest in maintaining his relationship with his child for their mutual benefit, it becomes highly relevant in proceeding instituted by mother to change child's name. S.H.A. ch. 96, P 1 et seq.

[7] NAMES k20
269k20
In light of evidence that divorced father maintained active interest in child born during now dissolved marriage, loved her, continued to support her and had committed no wrong toward her, and in absence of evidence that granting name change to child would further any purpose other than that of temporary, and superficial, expedient, best interest of child would be served by denying petition for change of name, awaiting her maturity and leaving name change decision to her. S.H.A. ch. 96, P 1 et seq.

***725 **952 ***308** John R. Sprague, Sprague, Sprague & Ysursa, Belleville, for respondent-appellant.

Robert E. Wells, Jr., Pessin, Baird & Wells, Belleville, for petitioner- appellee.

JONES, Justice:

Respondent father appeals from an order of the trial court which granted a petition to change the surname of his minor daughter to that of the new husband of his ex-wife, the mother of his child. We reverse.

The respondent, Robert G. Omelson (father), and Vicki Omelson (mother) were married on May 5, 1972, in St. Clair County. One child, Lori, the petitioner, was born of the marriage on May 6, 1975. A judgment of dissolution of marriage was granted to the mother in St. Clair County on February 5, 1980. The judgment of dissolution granted custody of Lori to the mother and conferred visitation rights upon the father, including every weekend from 5 p.m. Friday to 10 p.m. Sunday, certain holidays and four weeks during the summer months. The judgment directed the father to pay $35 per week for support of the child.

***726** The mother married Michael Nichols on June 7, 1980, four months following the dissolution. The father remarried in April 1981. Following her remarriage, the mother and Lori became residents of Collinsville in Madison County. On July 21, 1980, the child, Lori Anne Omelson, by her mother as next friend, filed a petition in the circuit court of Madison County for an order changing her surname to Nichols. At the time this petition was filed, Lori Anne was barely five years old and had resided in the Nichols' home about seven weeks. As required by the applicable statute (Ill.Rev.Stat.1979, ch. 96, par. 3), notice of the filing of the application for change of name was given by publication. The father was then living and working in Joliet, Illinois, and he learned of the name-change petition from a friend who had seen the publication notice. The father first filed an answer and an affirmative defense in the Madison County proceeding. Two weeks later, in the same St. Clair County case in which the parties had been granted a dissolution of their

marriage, the father obtained an order of permanent **953 ***309 injunction which restrained the mother "from proceeding with her Petition for Change of Name in the Circuit Court for the Third Judicial Circuit, Madison County, Illinois, in Case No. 80-MR-214 until the further order of this Court." The order of permanent injunction was entered on September 11, 1980.

On September 28, 1981, the daughter, Lori Omelson, by her mother and next friend, filed a second petition for change of her surname to Nichols. The second petition was filed in the same St. Clair County case in which her parents had obtained a dissolution of their marriage and in which the injunction against the Madison County name-change proceeding was obtained. Lori's petition alleged, in its substantive part, that she had "incorporated" into the Nichols household after her mother's marriage, that upon commencing school she has chosen to use the surname of Nichols and that it is in her best interest that her surname be changed to Nichols. Accompanying Lori's petition for change of name was a petition for the mother for an injunction against the father which prayed that he be enjoined from appearing at Lori's school, communicating with Lori's school, disrupting Lori's education, attempting to exercise his right of visitation without the required advance notice and removing Lori from the State of Illinois.

The father filed a response to the petition for change of name in which he answered both the petition for change of name and the mother's petition for injunction. He asserted, in substance, that he wanted his daughter to continue the use of Omelson as her surname, that it was not in the best interest of Lori that her surname be *727 changed to Nichols and that the mother had been guilty of wilful and contumacious conduct in interfering with and denying him his rights of visitation. The father's response ended with a prayer that the petition for change of name be denied and that the mother be held in contempt of court. Hearing was held, followed by a judgment entered November 9, 1981, in which the court found that "it is in the best interest of the parties' minor child that her surname be changed to Nichols; that Vicki Nichols has frustrated respondent's attempt to exercise his right of visitation with said minor child and is in contempt of court." The dispositional portion of the judgment (1) changed the name of the child to Lori Nichols and (2) sentenced the mother to two weeks in jail but stayed the jail sentence indefinitely with the proviso that the contempt would be purged by compliance with the terms of visitation until the child reaches the age of 18 years. Post-trial motions were denied, and the father appeals that portion of the judgment which granted the change in the surname of the child.

This case is one of first impression in Illinois for we find no case in which the issue here has been directly presented. However, the issue has been alluded to in three cases. In Solomon v. Solomon (1955), 5 Ill.App.2d 297, 125 N.E.2d 675, the court held that the matter of a change of name of a minor child of divorced parents is a matter incidental to the custody of the child and that the court which had jurisdiction of the divorce under the Divorce Act [not cited, but probably Ill.Rev.Stat.1953, ch. 40, par. 1, et seq.] could entertain a petition for injunction to enjoin the custodial parent from instituting any proceeding to change the name of a minor child of the parties. The court observed: "In determining whether or not any restraint should be put upon plaintiff's action in aiding the minor child to change his name, of course the first and most important consideration before the trial court should be ~~the welfare of the child~~. The matter is within the discretion of the court. The question of the ~~propriety of the trial court's order~~ is not before us and upon it we express no opinion." (5 Ill.App.2d 297, 301-02, 125 N.E.2d 675, 678.) In Lawrence v. Lawrence (1980), 86 Ill.App.3d 810, 41 Ill.Dec. 908, 408 N.E.2d 330, the court considered an appeal from the denial of a petition of a divorced mother for a finding that her ex-husband was not the father of a minor child born during wedlock. Part of the case before the trial court included a change of name of the minor

**954 ***310 obtained in a separate proceeding brought by the mother without the knowledge of her ex-husband. The trial court entered an order which held that the mother *728 was estopped from challenging the paternity of the minor and directed the mother to change the minor's name back to that of her ex-husband. In affirming, the court gave full credence to the statement in the Solomon case that the most important consideration in a proceeding to procure a change of name for a minor is the best interest of the child. In Weinert v. Weinert (1982), 105 Ill.App.3d 56, 60 Ill.Dec. 920, 433 N.E.2d 1158, the court considered an appeal from an order which dismissed, without an evidentiary hearing, a petition to modify a divorce decree. The basis of the ex-husband's petition was that there had been a change in the financial condition of both parties and that the ex-wife had remarried and was using the surname of her present husband as the surname of his children who, were in the custody of the ex-wife. The appellate court reversed and remanded for an evidentiary hearing, stating with regard to the name change: "Petitioner's further allegations that the children refused to visit with and acknowledge petitioner as their father, and the unfortunate possibility respondent may have interfered with petitioner's visitation rights so to keep the children and her new husband as a family unit to the exclusion of petitioner, may also establish substantial changes in circumstances warranting modification of petitioner's obligation. * * * We turn finally to the matter of the use by the children of their stepfather's surname. Respondent argues the children have a common law right to take any name they may choose, citing Reinken v. Reinken (1933), 351 Ill. 409, 184 N.E. 639. However, the court there noted this right is not absolute and must not interfere with the rights of others (351 Ill. 409, 413, 184 N.E. 639, 640). The interest of petitioner that his sons bear his surname would appear to qualify their right to use their stepfather's surname where the latter has not adopted them and is not legally burdened with an obligation of support. (See Solomon v. Solomon (1955), 5 Ill.App.2d 297, 125 N.E2d 675; Hall v. Hall (1976), 30 Md.App. 214, 351 A.2d 917.) * * * While the trial court did find that the interests of the children would best be served by allowing them to use the stepfather's surname as they have for the past few years, that determination should be reached only after a hearing where evidence, rather than allegations, can be adduced by both parties. [Citations.] We do not intend by our comments to suggest that conclusion should be reached by the trial judge after a hearing." 105 Ill.App.3d 56, 60, 60 Ill.Dec. 920, 922-23, 433 N.E.2d 1158, 1160-61.

[1] There is no lack of cases from other jurisdictions that have considered *729 the issue presented. The common thread that runs through these cases is ~~that the best interest of the child must govern a determination whether or not to grant a change of name.~~ (E.g. Sobel v. Sobel (1957), 46 N.J.Super. 284, 134 A.2d 598; Degerberg v. McCormick (1963), 41 Del.Ch. 46, 187 A.2d 436; West v. Wright (1971), 263 Md. 297, 283 A.2d 401; see Annotation, "Rights and remedies of parents inter se with respect to their children," 53 A.L.R.2d 914 (1957).) Since the above-cited Illinois cases assert the same principle, it is the criterion by which this case must be decided. To state the issue briefly, is it in the best interest of Lori Omelson that her surname be changed to Nichols?

The contexts in which the cases have considered whether the best interest of a child will be served by granting a change of name vary widely. Cases involve children who have been abandoned, abused, sexually molested, fathered by one convicted of a henious or notorious crime, born out of wedlock, and so forth. In such instances it is almost always held that a child's best interest would be served by granting a change of name. See West v. Wright.

We consider in this case, however, the more ordinary circumstance of a dispute involving divorced parents, both of whom **955 ***311 have remarried and established separate households.

Both parents love the child and both want the best for her. The father is current in his support payments and exercises his right of visitation with reasonable frequency, in view of the fact that he is now a resident of Crown Point, Indiana. The father very much wants Lori to continue to bear his surname. The mother had custody and is charged with the day-to-day guidance, care and nurture of the child. The mother's new husband has children by another marriage who occupy the same household and bear his surname of Nichols. The mother determined that Lori would be spared embarrassment, annoyance, derision and ridicule by her peers and would share a deeper sense of belonging to the newly-cast family if her name were changed to Nichols. Thus this proceeding. The background described has presented itself with some frequency in the cases, and from them general rules and guidelines have evolved which present what we feel is a well reasoned majority rule.

[2][3][4] Initially we would comment that although the petition for change of name is brought in the name of Lori, she is of such tender years that she could have no independent judgment in the matter and would be wholly subject to the suggestion and desire of her mother. Accordingly, we regard the proceeding as instituted and prosecuted by the mother. (Degerberg v. McCormick; Lazow v. Lazow (Fla.App.1962), 147 So.2d 12; Mark v. Kahn 333 Mass. 517, 131 N.E.2d 758.) ***730** Thus, further questions arise: whether the mother seeks to advance her own interest in bringing the petition and whether the mother's interest is also in the best interest of the child? Although the interests of mother and child will frequently coincide, they can frequently diverge. It is a generally accepted rule that there should be no conflicting interests between the infant and the party representing him. (Clarke v. Chicago Title & Trust Co. (1946), 393 Ill. 419, 66 N.E.2d 378; Millage v. Noble (1929), 334 Ill. 315, 166 N.E. 50.) The situation could present a conflict of interest and care must be taken, especially where the minor is of tender years, to assure that some purpose of the custodial parent does not taint the determination of the child's best interest. For instance, the mother may be prompted to petition for a name change in order to punish the ex-husband and father, to prove her enduring devotion to her new husband, to show her new husband that all ties to her former marriage are broken, to present to the community a facade of a unitary family, or to hide the fact that the mother had previously been through a divorce. Some credence for the last is found in a news account of the mother's remarriage which is in evidence. It gave the mother's maiden name and the name of the bride as Victoria Saul although that name had not been restored to her in the dissolution judgment. The same news item stated that Lori Anne Nichols served as flower girl but made no mention of the fact that Lori Anne was the daughter of the bride. The announcement was that of a marriage in a church on June 6, 1981. The mother had married Nichols in a civil ceremony on June 7, 1980. The judgment was entered changing Lori's surname to Nichols on November 9, 1981. Such machinations serve to render suspect the mother's motives in seeking a change of name for Lori. Admittedly, none of these possible motives are necessarily suggested by the evidence, and we neither presume nor infer them. Nevertheless, in determining whther the change of name is in the best interest of a child, it is well to consider whether the interests of others are sought to be served by the proceeding.

The "right" of a father to have his children bear his surname has not gone without attention in the change of name cases. The California case of In re Marriage of Schiffman (1980), 28 Cal.3d 640, 169 Cal.Rptr. 918, 620 P.2d 579, notes that surnames have been used at least since the Norman Conquest and discusses the historical background and rationale for the custom which assigns the surname of the father to his children. (169 Cal.Rptr. 918, 620 P.2d 579, 581.) The notion that a natural father has a right to have his children bear his surname receives scant credence in the more ****956 ***312** recent cases dealing with the subject. Rather, such ***731** issues are considered more

in the light of the best interest of the children rather than with regard to some right of the father. A discussion of the father's "right" to have his children bear his surname is found in the New Jersey case of Application of Lone (1975), 134 N.J.Super. 213, 338 A.2d 883, 887, where the court stated: "To the extent that the paternal 'right' represents a recognition of a father's interest in perpetuating his own name or in protecting his ego or in preserving his perceived male prerogatives, it may have little or no relevance to the best interests of the child or the propriety of a name change. But to the extent the 'right' recognizes the father's interest in maintaining his relationship with his child for their mutual benefit, it becomes highly relevant. Cases in other jurisdictions have expressed the father's 'right' in just such terms. In Degerberg v. McCormick, supra, the court noted that authority 'recognizes that a change of surname of a child of divorced parents may contribute to estrangement of the child from his father,' relying in part upon psychiatric testimony presented to that court that an attempted change of name 'created a "wedge" ' in the child's relationship with his father, and that his continued use of the stepfather's name 'will have a serious, adverse effect upon the child's development in his formative years.' Similarly, in Mark v. Kahn, 333 Mass. 517, 131 N.E.2d 758, 53 A.L.R.2d 908 (Sup.Jud.Ct.1956), the court expressed the view that The bond between a father and his children in circumstances like the present is tenuous at best and if their name is changed that bond may be weakened if not destroyed. * * * A change of name may not be in the child's best interest of the effect of such change is to contribute to the further estrangement of the child from a father who exhibits a desire to preserve the parental relationship. [131 N.E.2d at 762.] And in Robinson v. Hansel, [302] Minn. [34], 223 N.W.2d 138 (Sup.Ct.1974), the same considerations were stated in th following language: * * * courts have traditionally tried to maintain and to encourage continuing parental relationships. The link between a father and child in circumstances such as these is uncertain at best, and a change of name could further weaken, if not sever, such a bond. [223 N.W.2d at 140]."

We turn to the evidence in this case. In her testimony the mother gave as reasons for the name change Lori's wish for such, the probability ***732** of stigma from living in a household where everyone but she would have the surname of Nichols, and the adverse peer pressure that would result from Lori's attendance at a small Catholic school where the divorce by her parents would be apparent because of the difference in names. The mother presented no evidence to suggest that the father had abandoned Lori, that there was a lack of interest in her on the part of the father, or that the father had been guilty of any misconduct toward Lori or others.

The facts presented are very close to those in Application of Lone. There, the mother advanced three reasons why the change of name of the child should be granted, first, that to require him to live with a name different from his mother and brother would be to ask this child to carry a burden through his formative years that could very well have highly negative psychological implications; second, that Lone had abandoned his child; and third, that bureaucratic red tape would create chaos if formal recognition was not given to a name which the child might use informally. The court summarily dealt with the second and third reasons. As to the first reason, the court found that it implied essentially that growing up in the Dec family as the only Lone would set the child apart, at least in his own mind, and that among his peers his name would create confusion and embarrassment for him. In essence, that is the argument of the mother here. In language ****957 ***313** appropriate to the case under consideration and, we think, expressive of a great majority of the cases of similar context, the court in the Lone case disposed of the foregoing argument as follows: "Whether using language of paternal 'right' or these more relevant terms relating to the child's well-being, the cases of other jurisdictions almost uniformly have rejected contentions that

a child's psychological health requires that his name conform to that adopted by his mother on remarriage. See, e.g., Degerberg v. McCormick, supra; Mark v. Kahn, supra; Robinson v. Hansel, supra; West v. Wright, supra; Application of Trower [260 Cal.App.2d 75, 66 Cal.Rptr. 873], supra; Application of Shipley [26 Misc.2d 204, 205 N.Y.S.2d 581], supra; Application of Hinrichs [41 Misc.2d 422, 246 N.Y.S.2d 25], supra; Marshall v. Marshall, 230 Miss. 719, 93 So.2d 822 (Sup.Ct.1951); Reed v. Reed, 338 P.2d 350 (Okl.Sup.Ct.1959); contra, King v. Newman [421 S.W.2d 149 (Tex.Civ.App.)], supra; In re Adoption of McCoy, 31 Ohio Misc. 195, 60 Ohio Op.2d 356, 287 N.E.2d 833 (C.C.P.1972). The apprehensions which reasonably arise as to the possible effects of a name change, like the contrary apprehensions expressed by plaintiff, are persuasive and serious. A change of name imposed upon a child could represent to him a rejection ***733** by his father; or evidence that his father is deserving of rejection or contempt; or an attempt by his mother to deceive him as to his true identity; or a statement by his mother and stepfather that his true identity is a shame and embarrassment to them and others. Such consequences could be enormously harmful to the child. They are, of course, conjectural, but no less so than are the 'psychological implications' foreseen by plaintiff. The record thus generates only two conflicting groups of speculations as to the possible effects of a name change. No expert testimony has been offered, and no academic literature has been found, to assist in the weighing of these speculations. The realities are that the child's present name represents his identity, his paternity and a remaining bond with his father. There is no sound basis to conclude that any tampering with these realities would advance the best interests of the child." (Application of Lone (1975), 134 N.J.Super. 213, 338 A.2d 883, 887-8.) Not cited in Lone but to the same effect is Lazow v. Lazow (Fla.App.1962), 147 S.2d 12, 14, where the court stated: "To change the name of a minor son so that he no longer bears his father's name is a serious matter, and such action may be taken only where the record affirmatively shows that such change is required for the welfare of the minor. Society has a strong interest in the preservation of the parental relationship, Application of Shipley, 26 Misc.2d 204, 205 N.Y.S.2d 581 (1960); Mark v. Kahn, 333 Mass. 517, 131 N.E.2d 758, 53 A.L.R.2d 908, and a possible adverse effect on the relationship between father and child is a valid ground for refusing to change the name of a 12 year old child. At this tender age a child is not capable of making an intelligent choice in the matter of his name. See Mark v. Kahn, supra; In re Epstein, 121 Misc. 151, 200 N.Y.S. 897 (1923)." As pointed out in Robinson v. Hansel, cited in the Lone case, "Whatever the nature of the 'harassment' of the children by their peers, it would sem that it was in this case surely no more severe than [that] faced by thousands of other similarly situated children in a day when broken homes have become commonplace." (Robinson v. Hansel, 302 Minn. 34, 223 N.W.2d 138, 141.) This, too, is particularly appropriate here where the mother fears peer harassment at Lori's small Catholic school. We note, however, that the mother's fear rises no higher than apprehension; there is no evidence.

***734** [5] The mother's new husband, Michael Nichols, is not required to support Lori and has no legal responsibility toward her. Even if the change of name is granted Lori, her father must continue to support and educate her, extending through college. (Ill.Rev.Stat.1979, ch. 40, par. 513; Greiman ****958 ***314** v. Friedman (1980), 90 Ill.App.3d 941, 46 Ill.Dec. 355, 414 N.E.2d 77.) The father would continue to have rights of visitation with Lori, including four weeks during the summer. What of her "embarrassment" before her peers when she visits with a father whose name differs from hers? What of Lori's new name if her mother's second marriage is ended by divorce and she marries again? And in the event of the mother's untimely death, custody of Lori would probably revert to her father.

[6, 7] In view of the record before us, which shows a father who maintains an active interest

in his daughter, loves her, continues to support her and has committed no wrong toward her, the granting of a name change to Lori would further no purpose other than that of a temporary, and superficial, expedient. The majority rule as expressed in the Lone case must be applied. The best interest of Lori will be served in this case by denying the change of name, awaiting her maturity and leaving the decision whether to change her name to her at a time when she will be aided by her own desires and perceptions.

REVERSED.

KASSERMAN, J., concurs.

HARRISON, P.J., specially concurs.

HARRISON, Presiding Judge, specially concurring:

While I concur in the result reached in the majority opinion, I cannot concur in the discussion of possible motives of the mother which, as admitted by majority, are not necessarily suggested by the evidence. Nor can I concur in the conjecture regarding the mother's possible remarriage. This dicta is totally irrelevant to the resolution of the controlling issue in the case, which was properly decided by application of the best interest of the child standard.

(Cite as: 302 Minn. 34, 223 N.W.2d 138)

In re Application of Jeanine Hansel Robinson, Mother and Natural Guardian of Holly Hansel, et al., for Change of Their Names to Holly Hansel Robinson, et al.

Jeanine Hansel ROBINSON, Respondent,

v.

Richard D. HANSEL, Appellant.

No. 44724.

Supreme Court of Minnesota.

Nov. 1, 1974.

Natural mother, who had been awarded custody of the four minor children on divorce and who had subsequently remarried, filed petition to change surnames of the four minor children by adding the surname of her present husband. The natural father opposed the petition. The District Court, Ramsey County, Hyam Segell, J., granted petition, and the natural father appealed. The Supreme Court, Peterson, J., held that welfare of the children must ultimately be the controlling consideration in any change in status, that a natural father has standing to object to a change in surname, that judicial discretion in ordering a change of a minor's surname against the objection of one parent should be exercised with great caution and only where the evidence is clear and compelling that the substantial welfare of the child necessitates such change and that evidence supporting instant petition was neither clear nor compelling.

Reversed.

[1] DIVORCE k313.1

134k313.1

Formerly 134k313

Welfare of the child must ultimately be the controlling consideration in any change of status, such as change of a child's surname on remarriage of a mother who has been awarded custody on divorce from the natural father. M.S.A. ss 259.10, 259.11.

[2] NAMES k20

269k20

Natural father had standing to object to petition filed by natural mother for change in surname of the parties four natural children, custody of whom had been awarded to mother, and whose surname was sought to be changed by addition of surname of mother's present husband.

[3] DIVORCE k298(1)

134k298(1)

Even though a divorce decree may terminate a marriage the courts have traditionally tried to maintain and to encourage continuing parental relationships.

[4] NAMES k20

269k20

Judicial discretion in ordering a change of a minor's surname against the objection of one parent

should be exercised with great caution and only where the evidence is clear and compelling that the substantial welfare of the child necessitates such change. M.S.A. ss 259.10, 259.11.

[5] NAMES k20
269k20
Change in surname of minor children, custody of whom had been awarded to mother on divorce, by adding surname of mother's present husband was not warranted where natural father had exercised substantial amount of visitation rights granted him by divorce decree, whatever the nature of the "harassment" of the children by their peers it was no more severe than that faced by other similarly situated children and had not adversely affected their participation in school, notwithstanding that at least one of the children had developed a parent-child identification with petitioner's present husband. M.S.A. ss 259.10, 259.11.

**139 Syllabus by the Court

A change in surname of minor children from that of their divorced father to that of the new husband of their natural mother was not based upon clear and compelling evidence that the substantial welfare of the children necessitated such change.

*34 Goff & Goff, Sydney W. Goff, and John H. Feldman, St. Paul, for appellant.

Murnane, Murnane, Battis & Conlin and John R. Hoffman, St. Paul, for respondent.

*35 Heard before SHERAN, C.J., and ROGOSHESKE, PETERSON, MacLAUGHLIN, and SCOTT, JJ., and considered and decided by the court en banc.

PETERSON, Justice.

This is a proceeding in which the petitioner seeks to change the surnames of four minor children in her custody. The petition was opposed by the children's natural father. From an order of the Ramsey County District Court granting the petition, the natural father appeals. We reverse.

**140 Jeanine Hansel Robinson, petitioner, and Richard D. Hansel were divorced in 1969. Petitioner was awarded the custody of the four minor children of that marriage, namely, Holly Jean Hansel, now 17 years old; Kara Ann Hansel, 14; Heidi Marie Hansel, 10; and Brian Boyd Hansel, 6.

Petitioner remarried in 1970, and the four Hansel children have since been living with her and her new husband, Bruce Robinson. Robinson's natural children by a former marriage are living with his former wife. In October 1973 petitioner instituted an action, pursuant to Minn.St. 259.10 and 259.11, to change the surnames of each of the four minor children by adding the surname of petitioner's present husband. Thus, the surname 'Hansel' would become the surname 'Hansel Robinson.'

[1][2][3] The precise issue of whether a change in a child's name should be ordered over the objection of a natural parent is one of first impression in this court. There is no issue, however, that the welfare of the children must ultimately be the controlling consideration in any change of status. A change in surname, so that a child no longer bears his father's name, not only obviously is of inherent concern to the natural father, so that he should have standing to object, but is in a real sense a change in status having significant societal implications. Society has a strong interest in the preservation of the parental relationship. Even though a divorce decree may terminate a marriage, courts have traditionally tried to maintain and to encourage continuing parental relationships. The link between a father and child in circumstances *36 such as these is uncertain at best, and a change

of name could further weaken, if not sever, such a bond.

This consideration has been recognized in a number of jurisdictions.[FN1] In Massachusetts, for example, the Supreme Judicial Court refused, in the case of Mark v. Kahn, 333 Mass. 517, 521, 131 N.E.2d 758, 762, 53 A.L.R.2d 908, 913 (1956), to change the names of minor children, holding:

FN1. See, generally, Annotation, 53 A.L.R.2d 914.

'* * * A change of name may not be in the child's best interest if the effect of such change is to contribute to the further estrangement of the child from a father who exhibits a desire to preserve the parental relationship.' In Ohio, the court held, in Kay v. Kay, Ohio Comp.Pl., 51 Ohio O. 434, 438, 112 N.E.2d 562, 567 (1953): '* * * Ordinarily a change of the name of a minor child of divorced parents should not be granted where it might contribute to the estrangement of the child from its father who has shown a desire to preserve the parental relationship, * * *.' Other courts have looked to the natural and appropriate desire of the father to have his children bear and perpetuate his name,[FN2] as well as to the desirability of the child knowing his own parentage.[FN3]

FN2. Clinton v. Morrow, 220 Ark. 377, 247 S.W.2d 1015 (1952).

FN3. Matter of Epstein, 121 Misc. 151, 200 N.Y.S. 897 (1923).

[4] We are fully persuaded, for like reasons, that judicial discretion in ordering a change of a minor's surname against the objection of one parent should be exercised with great caution and only where the evidence is clear and compelling that the substantial welfare of the child necessitates such change.

[5] The evidence supporting the petition for change of name is neither clear nor compelling. It is clear that the principal reason for the trial court's ordering a change of surname was that the made child, Brian, age 6, who was born after his natural parents ***37** were separated, but several months before the divorce, 'looks upon Bruce Robinson, the petitioner's husband, as his father, and uses the name Robinson as his own name.' How it came to be that he does use the Robinson name is not stated in ****141** the record, but it seems unlikely that it was encouraged by his natural father. It is clear that his natural father had exercised a substantial amount of visitation rights granted him by the divorce decree, demonstrating his effort to maintain a familial relationship with his son and daughters.[FN4]

FN4. Petitioner contends that Richard Hansel, the father, had failed consistently to make support payments as ordered in the divorce decree. It is clear, however, that the trial court did not consider this as a reason for its order. Whatever the reason for these defaults, moreover, they are not of such character as to evince a total indifference or neglect of his children over a period of years.

The trial court concluded that '(i)t would not be practical to change the name of Brian Hansel without changing the names of all of the children, and it would not be in the best interests of any of the children to change the name of one without changing the others.' As to these other older children, there was some evidence that they had experienced 'some difficulty in the way of harassment by schoolmates and friends, and difficulty has also been experienced in obtaining insurance coverage, and an application for scholarships to college.' The court did not treat this as

compelling a change of name. The nature of the evidence demonstrated the difficulties to be both minor and transitory. The children's participation in school and school activities had not been adversely affected. Whatever the nature of the 'harassment' of the children by their peers, it would seem that it was in this case surely no more severe than faced by thousands of other similarly situated children in a day when broken homes have become commonplace.

The petition for change of surname stems not alone from the divorce but from a custody status. Awarding permanent custody is impermanent to the extent that death or subsequent divorce ***38** of a custodial parent may materially alter circumstances. This potential could well lead to restoration to the child of the natural father's surname or, if this change of name were sustained, to yet another name. We do not dismiss out of hand the finding that at least one of the children has developed a parent-child identification with one other than his father. If this matures into a strong and permanent identification, at maturity the time may well come when the child may cause an appropriate change of surname as his or her voluntary act.

Reversed.

(Cite as: 124 Ga.App. 603, 184 S.E.2d 696)

Thomas R. JOHNSON

v.

Carole S. J. COGGINS.

No. 46664.

Court of Appeals of Georgia, Division No. 2.

Oct. 15, 1971.

Proceeding on application to change surname of petitioner's children to that of petitioner and children's stepfather. The Superior Court, Elbert County, George B. Culpepper, III, J., granted application, and natural father appealed. The Court of Appeals, Jordan, P.J., held that granting of application with respect to eight and seven-year-old children, who were in custody of mother, who had amicable relationship with their father, who desired to have same surname as mother and stepfather, and one of whom assertedly suffered some emotional disturbance due to his surname, was not abuse of discretion.

Judgment affirmed.

[1] NAMES k20

269k20

Granting of application to change surname of eight and seven-year-old children, who were in custody of mother, who had amicable relationship with their natural father, who desired to have same surname as mother and stepfather, and one of whom assertedly suffered some emotional disturbance due to his surname, to that of stepfather was not abuse of discretion. Code, s 79-501 et seq.

[2] NAMES k20

269k20

In determining application to change surname of children, it is appropriate to give paramount consideration to best interests, welfare and happiness of children. Code, s 79-501 et seq.

****696 *604** Grant & Matthews, Carlton G. Matthews, Elberton, for appellant.

Heard, Leverett & Adams, E. Freeman Leverett, Elberton, for appellee.

Syllabus Opinion by the Court

***603** JORDAN, Presiding Judge.

The petition, Mrs. Coggins, sought to change the surname of her two minor children, then ages 8 and 7, to that of their stepfather, over the objections of their natural ***604** father, her former husband. Under the terms of a divorce decree the petitioner has custody and control of the children, and their father has visitation rights and provides for their support. An amicable relationship exists between the children and their father, but both of the children desire to have the same surname as their mother and stepfather, with whom they reside. There is also medical testimony to the effect that the older child suffers from some emotional disturbance brought about by the fact that his name is not the same as that of his mother and stepfather. The father appeals from an order granting the change in name. Held:

[1][2] We affirm. Under the provisions of Code, s 79-501 et seq., as amended, Ga.L.1961, pp. 129, 130, whether a judge of the superior court shall grant or refuse a proper application for a

change in name, upon objection and after a hearing, involves the exercise of a sound legal discretion. Here, as in Binford v. Reid, 83 Ga.App. 280, 63 S.E.2d 345, decided under the former statute, the record and transcript reveal no abuse of this discretion. While the codal provisions set no standards for determination, the order of the trial judge reflects that he gave paramount consideration to the best interests, welfare, and happiness of the children as disclosed by the evidence. This is in accord with the established standards for determining custody of minor children, which we consider appropriate for application in determining a change in name.

Judgment affirmed.

QUILLIAN and EVANS, JJ., concur.

William C. KING, Jr., Appellant,
v.
Jan T. NEWMAN, Guardian of William C. King, III, et vir, Appellees .

No. 14619.

Court of Civil Appeals of Texas.
San Antonio.

Oct. 11, 1967.

A divorced mother and her successor husband petitioned for change in name of minor child whose custody had been awarded mother in the divorce. The 166th District Court, Bexar County, Peter Michael Curry, J., granted the application and the natural father appealed. The Court of Civil Appeals, Barrow, C.J., held that stepfather and mother were not proper next friends of child and trial court should have appointed guardian ad litem to represent interest of child in proceedings to change child's name.

Reversed and remanded.

[1] NAMES⊜ 20
269⊜20
Applicant who seeks to change minor's name has burden to establish by satisfactory evidence that change would be for benefit and interest of minor. Vernon's Ann.Civ.St. art. 5929.

[2] NAMES⊜ 20
269⊜20
Under statute which authorizes change of name of minor, reviewing court will not interfere with decision of trial court except upon showing of abuse of discretion. Vernon's Ann.Civ.St. art. 5929.

[3] INFANTS⊜ 19.2(2)
211⊜19.2(2)
In custody cases, best interest of child is main consideration regardless of relative rights of contesting parties.

[4] PARENT AND CHILD⊜ 2(8)
285⊜2(8)
Law presumes that natural parents are ones best qualified to serve best interests of minor child although third party can rebut such presumption by proving that natural parent is morally unfit to have custody or that, for other reasons best interest of child demands that his custody be awarded to third party.

[5] NAMES⊜ 20
269⊜20
In considering application of mother to have minor child's name changed, best interest of child rather than natural father's right is primary consideration. Vernon's Ann.Civ.St. art. 5929.

[6] NAMES⊜ 20
269⊜20
Best interest of child is usually not served if change of name contributes to further estrangement from his father who desires to preserve parental relationship. Vernon's Ann.Civ.St. art. 5929.

[7] INFANTS⊜ 78(1)
211⊜78(1)
Stepfather and mother who was awarded custody of child in divorce proceeding were not proper next friends of child and trial court should have appointed guardian ad litem to represent interest of child in proceedings to change child's name. Rules of Civil Procedure, rule 173; Vernon's Ann.Civ.St. art. 5929.

***149** Trueheart, McMillan, Russell & Hoffman, San Antonio, for appellant.

Lang, Cross, Ladon, Oppenheimer & Rosenberg, San Antonio, for appellees.

BARROW, Chief Justice.

This is a suit brought by the mother and stepfather on behalf of a seven-year- old boy to change his name from William C. King, III, to John Tracy Newman. His natural father intervened and contested the change. After a non-jury trial, judgment was entered granting the application. The trial court did order appellees to correct baptismal and other records to show appellant as the boy's father and provided specific visitation rights. The basic question ***150** to be resolved is, under what circumstances, if any, may the trial court change a child's name over the objection of its natural father.

Appellant, William C. King, Jr., and appellee Jan Tinsley Newman were divorced on May 22, 1961, and the custody of their two-year-old son, who is referred to

herein as 'Trey' as he was called by all parties, was awarded to his mother, with appellant having the right to reasonable visitation. On August 22, 1961, Jan was married to appellee Harry E. Newman, and Trey has made his home with the Newmans continuously since that time. A daughter and a son were subsequently born to the Newmans. The record conclusively demonstrates that there is a very close family relationship among the Newmans and the three children living in the home, with no distinction whatsoever made between Trey and his half sister and half brother. Harry E. Newman has treated Trey as his son and the boy has reciprocated with love and respect. Furthermore, the parents of Harry have treated Trey as their grandchild, and have created a substantial trust for him along with their other grandchildren.

On the other hand, the record establishes a desire on the part of appellant to preserve his parental relationship with his son. He has made the support payments as ordered by the trial court, including an increase granted in 1962, and has reasonably utilized the visitation rights granted him by the court. There is no finding of any misconduct or neglect on his part. Appellant's mother and other members of the family love Trey and are proud of him. Appellant's family name is well and favorably known in this community.

It is apparent from the record and, in fact, the Newmans both testified that they desire the full responsibility of Trey to the total exclusion of his natural father. They testified that since their marriage Trey has been known under the surname of Newman. Obviously, a child of his tender years could not do this without the active assistance and encouragement of the Newmans. In 1963, Trey was baptized in the Episcopal Church under the name of 'John Tracy Newman,' with Harry E. Newman designated as the father. In 1964, he was enrolled in the kindergarten as 'John Tracy Newman,' again with Harry listed as his father. In 1965 he was enrolled in the first grade in the same manner, and it was not until near the end of the school year that Trey's teacher knew of his natural father. His playmates refer to him as 'Trey Newman.' The records of Trey's doctor were changed by Mrs. Jan Newman to reflect the name 'Trey Newman.' All of this was done without the knowledge or consent of appellant or any court.

In October, 1966, Mrs. Jan Newman contacted appellant with the request that he consent[FN1] to the adoption of Trey by Harry. When appellant refused, she informed him of the above-mentioned changes in Trey's identity. Appellant immediately verified this with the Church and school, and requested the proper authorities in each instance to correct their records to show that he is the natural father of Trey. Shortly thereafter appellees brought this suit on behalf of Trey and refused appellant his visitation rights.

FN1. See Gunn v. Cavanaugh, 391 S.W.2d 723 (Tex.Sup.1965).

The right of a custodial mother to change the surname of a minor after she remarries has been the subject of frequent judicial consideration throughout the United States. In 53 A.L.R.2d 914, is a comprehensive review of the authorities under the annotation 'Rights and remedies of parents inter se with respect to the names of their children.' The general rule is stated as follows: 'The courts have generally recognized that the father, who is ordinarily the objecting party, has a protectible interest in having his child bear the parental surname in accordance with the usual custom, *151 even though the mother may have been awarded custody of the child. So, a change of name will not be authorized against the father's objection, merely to save the mother and child minor inconvenience or embarrassment. However, where the child's substantial interests require a change of name, as where the father's misconduct has been such as to justify a forfeiture of his rights or where his name is positively deleterious to the child, the change may be permitted.'

[1][2] Art. 5929, Vernon's Ann.Civ.St., authorizes the district court to change the name of a minor upon application being made by the guardian or next friend 'if the facts alleged and proven satisfy him that such change will be for the benefit and interest of the minor.' It has been held that the burden is on applicant under this statute to prove by evidence satisfactory to the court that the change would be for the benefit and interests of the minor. Plass v. Leithold, 381 S.W.2d 580 (Tex.Civ.App.--Dallas 1964, no writ); Ex parte Taylor, 322 S.W.2d 309 (Tex.Civ.App.--El Paso 1959, no writ). Under these authorities, the action of the trial court should be upheld in the absence of a showing of an abuse of discretion

The trial court held that although appellant has a

protectible interest in having his child bear his name. this interest and his desire is secondary to the best interest of the child. The court concluded that upon full and satisfactory evidence the best interests of the child are served by granting the application changing his two given names as well as his surname.

Under his first two points appellant urges that this conclusion was an abuse of discretion in that it was not in the best interests of the child to alienate him from his natural father. Further, it is urged, under his third point, that such action is in violation of his rights under the Constitution in that his tie with the child could only be forfeited by misconduct or unfitness. Under appellant's fourth point he urges that the boy's constitutional rights were violated by this action. Under the fifth point he urges that the trial court erred in changing the name because it amounted to a reward of appellees' actions in falsifying the name and parentage of the child so as to constitute a fraud on the child, appellant and the courts.

[3][4] These points are all somewhat interrelated and therefore will be considered together. The basic problem is related to the conflict between the protectible interest of the parent, or 'natural right rule,' and the 'best interest rule,' which is present in much child custody litigation. Insofar as custody is concerned, the Texas Supreme Court has adopted this position: The best interest of the child is the main consideration, regardless of the relative rights of the contesting parties. The law will presume that the natural parents are the ones best qualified to serve those interests, but the third party can rebut this presumption by proving that the natural parent is morally unfit to have custody or that, for other reasons, the best interest of the child demands that his custody be awarded to the third party. Herrera v. Herrera, 409 S.W.2d 395 (Tex .Sup.1966); Hendricks v. Curry, 401 S.W.2d 796 (Tex.Sup.1966); Mumma v. Aguirre, 364 S.W.2d 220 (Tex.Sup.1963); 19 Baylor Law Rev. 299.

[5][6] Inasmuch as this application for change of name of the minor presents somewhat the same problem involving the future of this young boy, the trial court properly considered the best interest of the child rather than the father's right as the primary consideration. This did not violate any of the father's constitutional rights. It should not be overlooked, however, that all courts considering the question have held that the best interest of a child is usually not served if the change of name contributes to a further estrangement from his father who desires to preserve the parental relationship. Plass v. Leithold, supra; Mark v. Kahn (Mass.), 131 N.E.2d 758, 53 A.L.R.2d 908; In re Shipley, 26 Misc.2d ***152** 204, 205 N.Y.S.2d 581; Degerberg v. McCormick, 41 Del.Ch. 46, 187 A.2d 436; Reed v. Reed (Okl.), 338 P.2d 350; Marshall v. Marshall, 230 Miss. 719, 93 So.2d 822; 65 C.J.S. Names s 11(2).

The trial court's conclusion that the best interests of the child are served by granting this application is based upon the finding of fact that the child has established his identity under the name of 'John Tracy Newman' and that it would be humiliating, embarrassing, confusing, and, in all reasonable probability, disruptive of harmony in his home life for him to go under a different name from the other members of his family, and, further, that in all reasonable medical probability the impact of changing his name now might have a detrimental effect on his personality as he grows older.

At the time of the trial, Trey was about seven and a half years of age. For over five years, he had lived in and been identified as a member of the Newman family in a close relationship. All the testimony establishes that the Newman family is a very fine Christian family and that Trey has become an integral part of it. There is nothing in the record to show why his two given names were changed, other than to sever all identity with his natural father. In any event, the undisputed evidence is that all persons know him as 'Trey Newman.' The pediatrician, who has treated Trey since birth, testified that it might be detrimental to 'change' his name back to King, since Trey has established his identity with this family unit. A clinical psychologist, who was employed by the Newmans in December, 1966, for the purpose of giving expert testimony in this case, expressed the same opinion.

It is true, as urged by appellant, that this identity was built up largely as a result of the actions of the boy's mother in improperly identifying him at home, at school and even on his baptismal record. Yet, as was said in Mumma v. Aguirre, supra, 364 S.W.2d p. 221, '* * * our courts do not normally concern themselves with the righteousness of claims to custody of children; their paramount concern is with the best interests of the

children.

[7] This action serves to demonstrate that the child's best interests required the appointment of a guardian ad litem to represent him. He is not old enough to understand the serious consequences involved in this change of name. We cannot conceive a seven-year-old child telling his natural father that he did not want to go under his father's name, without receiving encouragement and suggestion from adults in a position of influence over him. Notwithstanding the sincerity and purpose of his mother and stepfather in bringing this suit, it is obvious that there is a possible conflict between the best interests of this child and that of the Newmans. They admittedly are interested in severing all ties between the child and his natural father. This is conclusively shown not only by their admissions at this trial but also by their action in changing even his given names without reason. Certainly, the child would have little to gain in a personal vendetta between his natural parents. Despite the testimony of the medical experts as to the desirability of severing all ties with a natural father who had not forfeited his rights, our law still presumes to the contrary. In this situation, the Newmans were not proper next friends for the minor plaintiff and the trial court should have appointed a guardian ad litem on behalf of said minor child.

Rule 173, Texas Rules of Civil Procedure, provides that when a minor is represented by a next friend or guardian who appears to the court to have an interest adverse to such minor, the court shall appoint a guardian ad litem for such minor. This rule has been held to be mandatory. King v. Payne, 156 Tex. 105, 292 S.W.2d 331, 335 (1956); Wallis v. Stuart, 92 Tex. 568, 50 S.W. 567 (1899); Jaynes v. Lee, 306 S.W.2d 182 (Tex.Civ.App.--Texarkana 1957, no writ); McDonald, Texas Civil Practice, s 3.09.3. See also 'P' v. Dept. of Health, 200 Misc. ***153** 1090, 107 N.Y.S.2d 586. In Cooper v. Liverman, 406 S.W.2d 927, 931 (Tex.Civ.App.--Texarkana 1966, no writ) the Court held that fathers of minors who had adverse interests to said minors were not proper next friends. In remanding the case, the Court said: 'We hold that under such circumstances, even though the matter was not called to the attention of the trial court, that nevertheless a guardian ad litem should have been appointed to represent the interests of said minors.'

The judgment of the trial court is reversed and the cause remanded.

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53 A.L.R.2d 908
(Cite as: 333 Mass. 517, 131 N.E.2d 758)

Alfred J. MARK
v.
Harold KAHN & another.

Supreme Judicial Court of Massachusetts, Middlesex.

Argued Dec. 7, 1955.

Decided Feb. 3, 1956.

Equity proceeding to enjoin former wife, who had been granted custody of children under divorce decree, and her current husband, from registering children in school under surname of wife's current husband, and from representing that surname of children was that of former wife's current husband. The Superior Court, O'Brien, J., entered a decree enjoining the defendants, and the defendants appealed. The Supreme Judicial Court, Spalding, J., held that under appropriate circumstances, upon application by former husband, equity will enjoin former wife, who has been granted custody of children in divorce decree, from informally changing surname of children to that of her current husband, or from representing that children's surname is different from that of their father, though, in instant case, absence of finding on controlling issue, whether use of surname of wife's current husband was for best welfare of children, required reversal of decree for husband, and warranted retrial.

Decree reversed with directions.

[1] COURTS⚿ 24
106⚿24
Consent or waiver by the parties cannot confer jurisdiction over a cause where none exists.

[2] APPEAL AND ERROR⚿ 23
30⚿23
Though question whether equity court would, upon application of former husband, enjoin former wife, who had been granted custody of children in divorce decree, from informally changing surname of children to that of her current husband, or from representing that children's surname was different from that of their father, was not raised in court below or on appeal, Supreme Judicial Court had duty to notice and decide issue upon its own motion.

[3] INJUNCTION⚿ 94
212⚿94
Under appropriate circumstances, upon application by former husband, equity will enjoin former wife, who has been granted custody of children in divorce decree, from informally changing surname of children to that of current husband, or from representing that children's surname is different from that of their father.

[4] NAMES⚿ 20
269⚿20
At common law, a person could change his name at will, without resort to legal proceeding, by merely adopting another name, if this was done for an honest purpose.

[5] NAMES⚿ 20
269⚿20
The statute regulating the changing of a person's name does not restrict a person's choice of name, but aids him in securing an official record which definitely and specifically establishes his change of name. G.L.(Ter.Ed.) c. 210, § 12.

[6] INJUNCTION⚿ 130
212⚿130
Where a father supports a child, and manifests a continuing interest in his welfare, and, without unreasonable delay, objects to an attempted change of child's surname, the equity court, upon application of father to enjoin former wife from informally changing child's surname, must decide issue by determining what is for the child's best interest.

[7] INJUNCTION⚿ 130
212⚿130
Upon application of former husband to enjoin former wife, who had been granted custody of children in divorce decree, from informally changing surname of children, in determining question whether change of name would be in child's best interest, such change is not in child's best interest if effect of change is to contribute further to estrangement of child from father, who exhibits desire to preserve parental relationship.

[8] INJUNCTION⚿ 109
212⚿109
Where a father has completely abandoned his child, or is indifferent to child's welfare, or has, by his serious

misconduct, caused the child embarrassment, the father may lose his right to enjoin former wife from informally changing child's surname.

[9] APPEAL AND ERROR⊜ 1178(2)
30⊜1178(2)
Where the facts on which the rights of the parties depend have not been ascertained at the trial, it is within power of Supreme Judicial Court, in its discretion, and of its own motion, to recommit the cause for retrial.

[10] APPEAL AND ERROR⊜ 1177(8)
30⊜1177(8)
In equity proceeding to enjoin former wife, who had been granted custody of children under divorce decree, and her current husband, from registering children in school under surname of wife's current husband, absence of finding on controlling issue, whether use of surname of wife's current husband was for best welfare of children, required reversal of decree for husband and warranted retrial.

***517 **760** Samuel H. Cohen, Boston, for plaintiff.

Phillip J. Nexon, Waltham, for defendants.

Before QUA, C. J., and WILKINS, SPALDING, WILLIAMS and WHITTEMORE, JJ.

SPALDING, Justice.

The plaintiff brings this bill in equity to enjoin the defendant Anna R. Kahn, his former wife who has remarried, from registering their minor children at school under the surname Kahn, which is her present name, or from representing that their name is Kahn. Although her husband is also a defendant we shall, for convenience, refer to Anna R. Kahn sometimes hereinafter as the defendant. ***518** The evidence is reported and the judge made findings of material facts.

The relevant facts are these: Of the marriage of the plaintiff to the defendant two children, a son, Theodore K. Mark, and a daughter, Leslie R. Mark, were born. At the time of the hearing below their ages were thirteen and ten respectively. In June of 1948 the defendant obtained a decree nisi of divorce from the plaintiff which became absolute on or about January 1, 1949. Under the decree the defendant was awarded custody of the two children and the plaintiff was ordered to pay $120 weekly for the support of the defendant and the children. There were additional provisions for the support and education of the children by agreement of the parties, but they need not concern us. This order was complied with until August 23, 1953, when the defendant married Harold Kahn. Thereafter the support order was modified so as to provide for weekly payments of $60 for the support of the children. Kahn, the defendant's present husband, has three children by a prior marriage. Thus there are at the present time five children in the Kahn household. Some of the Kahn children and the plaintiff's daughter Leslie attend the same grammar school. Theodore is a student at a junior high school. In 1953 the defendant registered Theodore and Leslie in school under the surname Kahn.

The plaintiff has remarried. The marriage took place in Elkton, Maryland, on March 31, 1949, three months after the divorce decree in this Commonwealth became absolute. Finding that the plaintiff's remarriage in Maryland was invalid in this Commonwealth (presumably by reason of G.L.(Ter.Ed.) c. 208, § 24, and c. 207, § 10), the judge further found that 'it does not cause embarrassment to the Mark children.' The judge stated that while he was mindful of the principles enunciated in Petition of Merolevitz, 320 Mass. 448, 70 N.E.2d 249, and Petition of Buyarsky, 322 Mass. 335, 77 N.E.2d 216, nevertheless, he was of opinion that the case at bar was not governed by them. 'The use by the Mark children, at the insistence of the defendants, of the surname Kahn is not for ***519** a fraudulent or other illegal purpose; it is however motivated by a spirit of hostility on the part of the defendants toward the plaintiff * * * rather than a desire to further the children's best interest.' He ordered the entry of a decree enjoining the defendants from registering Theodore and Leslie in school under the surname of Kahn or from representing that the surname of the children is Kahn. From a decree entered accordingly the defendants appealed.

[1][2] Where a parent having custody of a minor child pursuant to a decree of divorce may change the surname of such child or cause him to be called by a different name in the face of opposition of the former spouse, is a question that has never been decided by this court. Such a question was presented in Lord v. Cummings, 303 Mass. 457, 22 N.E.2d 26, in a petition in equity brought in the Probate Court but the court

refused to decide it because it was not a matter within the equity jurisdiction granted to the Probate Courts. [FN1] **761 The question whether the subject matter of the petition was within the general principles of equity jurisprudence was left open. In the present proceeding we are squarely faced with this question To be sure, the point was not raised in the court below and it has not been raised here. But consent or waiver by the parties cannot confer jurisdiction over a cause where none exists. Hence it is our duty to notice the point of our own motion. Baldwin v. Wilbraham, 140 Mass. 459, 4 N.E. 829; Eaton v. Eaton, 233 Mass. 351, 364, 124 N.E. 37, 5 A.L.R. 1426; Commonwealth v. Andler, 247 Mass. 580, 582, 142 N.E. 921.

FN1. That was a petition by a father to enjoin his divorced wife, who was given custody of their minor child, from doing anything to effectuate a change of the child's name.

The question presented not only is one of first impression in this Commonwealth but from a careful search of the authorities does not appear to have been passed on elsewhere. There are several decisions dealing with the right of one spouse to change the surname of a minor child in the face of opposition of the other spouse, but these cases have arisen either under a statute expressly empowering the court to grant such relief or as incidental to divorce proceedings. *520 See Clinton v. Morrow, 220 Ark. 377, 247 S.W.2d 1015; Don v. Don, 142 Conn. 309, 114 A.2d 203; Carnier v. Racivitch, 216 La. 241; Matter of Epstein, 121 Misc. 151, 200 N.Y.S. 897; Application of Wittlin, City Ct., 61 N.Y.S.2d 726; Matter of Almosnino, 204 Misc. 53, 122 N.Y.S.2d 277; Id., 204 Misc. 57, 122 N.Y.S.2d 277; Kay v. Kay, Ohio Com.Pl., 112 N.E.2d 562; Rounick's Petition, Com.Pl., 47 Pa.Dist. & Co.R. 71. In some of these cases the petition to change the name of the minor child was granted and in others it was denied. But none is authority for the proposition that one spouse may invoke the aid of a court of equity to prevent the other from registering the child in school under a surname different from that of the complaining spouse or from representing that the child's name is different.

[3] We are of opinion that the relief sought by the plaintiff here is one that a court of equity ought to grant in appropriate instances. The old notion that equity will protect only property rights, which stems from a dictum of Lord Eldon in Gee v. Pritchard, 2 Swanst. 402, was repudiated by this court recently in Kenyon v. Chicopee, 320 Mass. 528, 532, 70 N.E.2d 241, 175 A.L.R. 430. There it was said in 320 Mass. at page 534, 70 N.E.2d at page 244, 'We believe the true rule to be that equity will protect personal rights by injunction upon the same conditions upon which it will protect property rights by injunction. In general, these conditions are, that unless relief is granted a substantial right of the plaintiff will be impaired to a material degree; that the remedy at law is inadequate; and that injunctive relief can be applied with practical success and without imposing an impossible burden on the court or bringing its processes into disrepute.' Tested by these principles the present case, we think, is one where the aid of a court of equity may properly be invoked.

[4][5] Previously this court has said that at common law a person could change his name at will, without resort to legal proceedings, by merely adopting another name, provided that this was done for an honest purpose. Petitioner of Merolevitz, 320 Mass. 448, 450, 70 N.E.2d 249. The statute regulating the changing of name, G.L.(Ter.Ed.) c. 210, § 12, does not restrict *521 a person's choice of name but aids him in securing an official record which definitely and specifically establishes his change of name. Petitioner of Buyarsky, 322 Mass. 335, 338, 77 N.E.2d 216.

In the present case no court action seeking to change the children's surname has been brought; rather their mother has attempted by her own act to have the children of her first marriage adopt the surname of their stepfather. It does not follow that because one may adopt any name he may choose, so long as such change is not made for fraudulent purposes, Petitioner of Merolevitz, 320 Mass. 448, 70 N.E.2d 249, a parent may select for a child a name different from that by which such child is known. Kay v. Bell, 95 Ohio App. 520, 525, 121 N.E.2d 206. It does not appear here that the plaintiff's children have ever consented to being called Kahn. However, in view of their ages their consent would not necessarily be decisive. Until they reach an age **762 when they are capable of making an intelligent choice in the matter of their name they ought not to have another name foisted upon them which they may later reject. Prior to that time one in the plaintiff's position ought to have the right to be heard to prevent a change or use of a name different

from that of their birth. The bond between a father and his children in circumstances like the present is tenuous at best and if their name is changed that bond may be weakened if not destroyed. We recognize that here the defendant may not have effected an actual change of the children's name but by registering them at school under the name of Kahn she has gone far in that direction. We perceive no insuperable difficulties in enforcing decrees granting injunctive relief in cases of this sort.

[6][7][8] In the cases cited above dealing with change of names of children either under statutes or as incidental to divorce proceedings the following factors have been deemed to be relevant. When a father supports a child, and manifests a continuing interest in his welfare, and without unreasonable delay objects to an attempted change of name, the court must decide the issue by determining what is for the child's best interest. Kay v. Kay, Ohio Com.Pl., 112 N.E.2d 562. A change of name may not be in the child's best ***522** interest if the effect of such change is to contribute to the further estrangement of the child from a father who exhibits a desire to preserve the parental relationship. Rounick's Petition, Com.Pl., 47 Pa.Dist. & Co.R. 71. Undoubtedly there are instances when an informal change to the surname of a stepfather would be in the best interests of the child. A father who completely abandons a child, or is indifferent to a child's welfare or has by his serious misconduct caused the child embarrassment, can by his actions lose the right to successfully protest the child's change of name. See Rounick's Petition, Com.Pl., 47 Pa.Dist. & Co. R. 71; Matter of Almosnino, 204 Misc. 53, 122 N.Y.S.2d 277, Id., 204 Misc. 57, 122 N.Y.S.2d 277. There may be other factors, but these are the ones likely to be decisive in most cases.

[9][10] With these principles in mind we turn to the decision of the judge below. He found that 'The use by the Mark children, at the insistence of the defendants, of the surname Kahn * * * [was] motivated by a spirit of hostility on the part of the defendants toward * * * [the father].' It is doubtful whether this finding is supported by the evidence. [FN2] But be that as it may, there are lacking here sufficient findings to support the decree below. On the crucial and controlling issue whether the use of the name Kahn was for the best welfare of the children the findings tell us little. Conceivably the trial judge had that consideration in mind but his decision appears to have been based on the defendants' motive rather than what was best for the children. 'Where the facts on which the rights of the parties depend have not been ascertained at the trial it is within the power of the court, in its discretion and of it own motion, to recommit the cause for retrial.' DeVeer v. Pierson, 222 Mass. 167, ***523** 175, 110 N.E. 154, 157. Smith v. Commonwealth, 331 Mass. 585, 593-594, 121 N.E.2d 707, and cases cited.

FN2. All that the evidence shows on this issue is that on *two occasions the plaintiff talked to Mrs. Kahn over the* telephone protesting her action. On the first occasion she told the plaintiff that he would have to discuss the matter with her husband. On the second occasion Mrs. Kahn broke off the conversation by hanging up the telephone. On another occasion the plaintiff had a telephone conversation with Mr. Kahn in which he told Kahn that he had no right to change the name of his children. Kahn said that his lawyer told him that he could and that 'that is the way it was and that is the way it was going to continue.'

Accordingly the decree must be reversed and the case is to be further heard in conformity with this opinion.

So ordered.

END OF DOCUMENT

V. F. MARSHALL, Jr.

v.

Jerry Allen MARSHALL, a Minor, by Mother and Next Friend, Mrs. Juanita Reeves.

No. 40451.

Supreme Court of Mississippi.

April 1, 1957.

Proceeding on application of eleven year old minor by his mother as next friend to change his surname from that of his father from whom mother had been divorced to that of mother's husband in whose household minor lived. From a decree of the Chancery Court, Hinds County, S. V. Robertson, Jr., Chancellor, granting the change, father appealed. The Supreme Court, Hall, J., held that it was error, under the circumstances, for chancellor to grant the change of name over objection of father who had shared custody of minor until he moved from state and who continued to make payments for support and to display his affection for the minor.

Reversed and judgment rendered.

[1] NAMES 20

269 20

At common law, any person of mature years may voluntarily change his name, without necessity of statute, provided change is not for fraudulent purpose and does not interfere with rights of others.

[2] NAMES 20

269 20

In proceeding on application of 11 year old minor by his mother as next friend to change his surname from that of his father from whom mother had been divorced to that of mother's husband in whose household the minor lived, it was error, under the circumstances, for chancellor to grant the change of name over objection of father who had shared custody of minor until he had moved from state and who continued to make support payments and to display his affection for the minor.

****823 *720** Colin L. Stockdale, Jackson, for appellant.

Paul G. Alexander, Jackson, for appellee.

***721** HALL, Justice.

Jerry Allen Marshall is a minor of the age of 11 years and is a son of the appellant and Mrs. Juanita Reeves, who was formerly Mrs. Juanita Marshall. The parents were divorced by decree of the Chancery Court of Hinds County, Mississippi, on December 3, 1947, at which time both parents were residing in Hinds County. In the divorce decree provision was made dividing the custody of the minor child between the parents and directing the father to pay to the mother the sum of $25 per month for the support and maintenance of the child. In the decree the court retained jurisdiction pertaining to the custody and maintenance of the child. The decree was modified on May 27, 1950, to the extent that the mother was granted the custody of the child because the father had moved out of the State of Mississippi, but the decree continued in effect the amounts to be paid by the father for maintenance of the child, and gave to the father the right of reasonable visitation with the child.

On July 15, 1950, the mother married William Maxwell Reeves and they have continued to reside in Hinds County. The father, because of his occupation, later moved to New Orleans, Louisiana, and about three years ago moved to Detroit, Michigan, where he is employed as a radio and television newscaster. He, too, has remarried and both the father and mother are shown by the evidence to be happily married and maintaining homes in apparently good circumstances.

On May 7, 1956, the mother, both individually and as next friend for the minor, filed a petition in the Chancery Court of Hinds County under Section 1269-01, Code of 1942, asking that the minor's name be changed from ***722** Jerry Allen Marshall to Jerry Allen Reeves. On the same day, without notice to the father of the child, the chancellor entered a decree granting this change, but, during the same term of court, the chancellor ten days later rescinded the said decree and directed the issuance of process by publication for the father of the child. Upon receipt of this process the father employed an attorney and resisted the application for change of the child's name. The matter came on for hearing on August 10, 1956, on which date the chancellor entered a decree changing the child's name, and from that decree the father appeals.

At the hearing three witnesses testified in favor of the petition. The minor child said that he has lived with his mother all his life and with his stepfather ever since he and the mother were married. He said **824 that the only time he has ever used the name Jerry Allen Reeves was on an occasion when he attended a Y.M.C.A. camp. He also said that he sees his father about twice a year, the father making trips from Michigan back to Mississippi in order to see and visit with his son. The child also said that as long as the father was living in Hinds County he came to see him regularly, and that since he has been in Michigan he writes to the child about once a week, and in addition occasionally calls him up and talks to him over long distance telephone. He also said that his father sends him presents and does all in his power to keep as closely in contact with him as he can. His testimony is that he loves both his father and his mother and his stepfather.

Mrs. Reeves testified that for sometime after the divorce decree was entered the father did not contribute much to the support of the child, but she admitted that in order to catch up with the delinquencies the father has been sending her double payments each month since he became profitably employed. She also testified that the *723 father has been making trips to Hinds County to see and visit with the child and that she has never refused to let him see the child. She admitted that the father has regularly sent presents to the child and said that by so doing he has ruined two or three Christmases for her because the presents would arrive just before Christmas and the boy wouldn't then be interested in the Santa Claus which she was providing for him. She said that the commencement of this proceeding was at the instance of the child.

Mr. Reeves testified that he was very much agreeable to the change in name and that he has not tried to influence the boy in the filing of the petition and further that he has never denied Mr. Marshall permission to see Jerry at any time; that there is no friction between them and that he has always tried to be kind to Mr. Marshall.

Mr. Marshall testified that he has been living in Michigan for about three years, immediately prior to which he was living in Louisiana, and before that time he was in Mississippi. He said that he has never abandoned his child or done anything to show an indifference toward his welfare; that after the divorce and as long as he remained in Mississippi he visited the child every few days and further that he also saw him when he was living in Louisiana. He mentioned that he has done what he could for the child from a monetary standpoint; that when he was living here he got behind with his payments and that he has been making double payments in order to catch up with them. He testified that when he was down here he tried to get the boy to visit him in Michigan but that his mother and stepfather said that he didn't want to. Mrs. Reeves herself said that she was unwilling for the boy to visit his father in Michigan and gave as her reason that it was too far away. Mr. Marshall also testified that before Christmas 1953 Mrs. Reeves wrote him not to send the boy anything because it *724 spoiled her Christmas, but he bought the presents any way and wrote her saying that he would be here Christmas to bring them and she wrote back that she was taking the boy out of town. He also testified that a number of times before he went to Michigan he would write and ask to see his son and that Mrs. Reeves would say it wasn't convenient. He said that he has been denied the right to see his son a number of times and also that he was denied this privilege one Christmas.

The briefs in this case for both parties do not cite a single authority in point and evidently counsel did not cite anything to the court below. We have therefore had to make an investigation of the law ourselves. In 65 C.J.S., under the subject of Names, § 11, there is a subparagraph beginning near the bottom of page 21 and continuing onto page 22 which discusses the question of a change in the name of an infant. That subparagraph says in part: 'Change of **825 name of infant. An application to change the name of an infant should be granted only where to do so is clearly in the best interest of the child. Ordinarily a change of the name of a minor child of divorced parents should not be granted where it might contribute to the estrangement of the child from its father who has shown a desire to preserve the parental relationship, but such an application has been granted where the father is shown to have been indiffernet to the son's material welfare over a period of years and he is, in reality, a stranger and unknown to him.

In the case of Kay v. Kay, Ohio Com.Pl., 112 N.E.2d 562, 567, the court said: 'There are times when an informal change to the surname of the mother's second

husband may be desirable, as when the child's father indulges in improper conduct, fails to support, abandons the child, is presently, and in the past has been, indifferent to its welfare, and does not raise a timely objection to the *725 change of name. On the other hand when the father is supporting the child, manifests an abiding interest in the child, and, without delay, by a proper pleading in court objects to a change of name, then the court must decide the issue with a view to what is the best interest of the child.' After stating the above rule on page 567, the court quoted the above quotation from 65 C.J.S., Names, § 11, and then said:

'Applying the above principles to the facts in this case, as brought out by the testimony, the court concludes that the welfare of the child at this time does not call for a change of name from that of his father to the surname of the mother's second husband in whose home the child is now being raised. He is too young to be capable of making a choice of name for himself. At the age of seven years, or in his youth, he is not likely to be embarrassed or bothered by the fact that his name is different from that of his mother and her husband. While he has been entered in school for one year under the surname 'Crawford', if he resumes his father's name 'Kay' at the beginning of the next school year the change will hardly be noticed and should cause no long-lasting confusion. If right attitudes are suggested by adults, and no stumbling blocks are placed in its way by those about them, a child develops normally and free from frustrations. So it should be on both sides of this child's family.

'The child's father, while far removed from physical contact with his son because of his employment, is supporting the child regularly. There is no testimony that he is not interested in the child or that he does not have paternal affection for him. He has professed a strong desire to have the child bear his name, and without undue delay after the child had been registered in school under a different name he raised objection in this court.

'From time immemorial it has been the custom for male children to bear the family name of their father *726 throughout life. The paternity of a child cannot be changed. Under the circumstances here presented the Court cannot say that the name of the child should be changed. If, when the boy fully appreciates the circumstances and is capable of selecting a name for himself, he chooses to bear the surname of someone other than his father he may do so. The Court is convinced that in the meantime it would not contribute to the boy's welfare to permit interference with the usual custom of succession to the paternal surname, or to foster any unnatural barrier between the father and son.'

In the case of Application of Wittlin, City Ct., 61 N.Y.S.2d 726, the Court said:

'This is an application made by the mother of the infant, Arthur Christian Klevenz, for an order granting leave to the said infant to assume the name **826 of Arthur Klevenz Wittlin. The infant joins in the application. The boy is sixteen and a half years of age and resides with his mother, Sophie Wittlin, the petitioner herein. That the rights of the infant might be properly safeguarded, the Court conducted a hearing and formal proof has been adduced with respect to the subject matter of this petition.

'The infant and his sister, Mildred, are the issue of the marriage of Arthur J. Klevenz and the petitioner, Sophie Wittlin. The sister is now married and residing with her mother and stepfather. The boy was born on August 10, 1929. The parents separated on June 7, 1933, when he was barely four years of age. Subsequently the mother sought a divorce in the State of New Jersey. On March 31, 1942, in an uncontested proceeding, a decree of divorce was granted for abandonment. About a week later on April 6, 1942, the mother married her present husband, Solomon Wittlin. During the entire period of the separation and up to and including the present moment the father has continued to see the children and *727 has made some contribution to their support and maintenance. The family appears to have made an unusually favorable adjustment. The mother is happily remarried. The boy is well taken care of in his present home. He evinces strong feeling of regard for his stepfather. He is completing his work in a high school and is looking forward to continuing his education with a view towards ultimately becoming a commercial artist. The Court is satisfied that his mother and stepfather, as well as his natural father, are desirous to, and will continue to, be of reasonable assistance in the furtherance of the boy's education and in making necessary provision for him. Despite the long estangement of the parents and the remarriage on the part of the mother, the natural bonds of love and affection between the boy and his father survive. There are

regular periods of visitation and the relations of the boy and the father show evidences of camaraderie. No rancor seems to exist between the father and the mother and it is obvious to the Court that all sides have made every reasonable effort to salvage as much as possible of the remnants of the family relationship. 'This application is now made for permission to assume the name of the stepfather in place of that of the natural father. The sole basis for the application is the embarrassment flowing from the dual name in the household and the necessity of explanation therefor. This situation is the ordinary and foreseeable consequence of broken homes and the children as usual are the innocent victims of the strife. It does not, however, follow that in every case where there is divorce and remarriage that it is in the best interest of the children that the name of the mother's new husband be taken. Rather will it seem to be the duty of the Court to make such determination as will best serve the interest of the infant under all the surrounding circumstances. In this proceeding there *728 seems to be no factor creating undue or unusual embarrassment. The future welfare of the child in his relation to the present household will not be affected by a denial of this application. The stepfather does not urge nor has he inspired the application. The application has its origin primarily in the desire of the mother that her son assume the name of her present husband. It has been joined in by the son in his natural desire to please his mother and to save embarrassment for her and for himself. The natural father on the other hand is faced with the prospect of the abandonment of his name by his son despite **827 the fact that he has constantly maintained parental association and has been constant in making provision for support within his means, even though such contributions have been relatively meager.

'In the opinion of the Court it would be most unfortunate to do anything to further impair the altogether too slender bonds which now hold this family together. This father has lost the guardianship of his children. It will be time enough for them to abandon his name when they are free to arrive at a determination uninfluenced by conflicting pressures. While an infant sixteen years of age or over has a right to petition the Court for change of name, the Court nevertheless stands in locus parentis with respect to such infant and may grant such application only where to do so would clearly be in the best interest of the child. The child should not be subjected to the conflicting pressures of competitive loyalties where no real purpose will be served, and substantial harm may result of the satisfactory relations now enjoyed in every direction. Where a parent has abandoned his children or fails to visit them for protracted periods of time or contribute to their support, where continued use of a name may bring shame and disgrace, where the physical welfare of the child may be adversely affected by a denial of the application or *729 substantial property rights are involved, the Court would have no difficulty in permitting the change of name in the best interest of the infant. In this case the application rests on most tenuous grounds and to grant it may destroy the relationship between this child and his natural father. This the Court feels is not justified by any of the existing circumstances. The application is accordingly denied.'

To the same effect are the cases of In re Epstein, 121 Misc. 151, 200 N.Y.S. 897; and Petition of Rounick, 47 Pa.Dist. & Co. R. 71.

[1][2] We fully realize and appreciate the fact that at common law any person of mature years can voluntarily change his name without the necessity of a statute such as we have in Mississippi, provided the change is not for a fraudulent purpose and does not interfere with the rights of others. That rule is recognized in the same section of C.J.S. from which we have quoted above and a full and interesting discussion thereof is found in the case of Smith v. United States Casualty Co., 197 N.Y. 420, 90 N.E. 947, 26 L.R.A.,N.S., 1167, 18 Ann.Cas. 701. That case however has no application to the case at bar and it is our conclusion that the authorities which we have above cited conclusively establish the fact that the chancellor was not justified in changing this child's name from that of his father to that of his stepfather, and the decree of the lower court will therefore be reversed and a decree here entered to the effect that the child shall continue to be known as Jerry Allen Marshall. Of course when he reaches his majority there is no reason why he can not change his name to anything he desires. We are here dealing strictly with the change in the name of a minor.

Reversed and judgment here.

ROBERDS, P. J., and ARRINGTON, ETHRIDGE

and GILLESPIE, JJ., concur.

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Muriel Pressman NELLIS, Appellant,

Howard S. PRESSMAN, Appellee.

No. 5911.

District of Columbia Court of Appeals.

Argued Aug. 17, 1971.

Decided Oct. 20, 1971.

Custody proceedings in which the Superior Court of the District of Columbia, Joseph M. F. Ryan, Jr., J., entered order enjoining the mother from causing the children to be known by any surname other than that of their father, and their mother appealed. The Court of Appeals, Gallagher, J., held that injunction should not issue to require divorced and remarried mother who had custody of 16-year-old boy and 13-year-old girl who for more than 5 years had been using the same surname as their remarried mother to take all available steps to cause children to be known in school and elsewhere by their father's surname, in view of the realities of the situation and the views of the children who had good relations with their father who had not raised serious objection as to use of remarried mother's new surname until the trial.

Reversed with instructions to vacate injunction.

Reilly, J., filed a dissenting opinion.

DIVORCE⚷ 313.1
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Injunction should not issue to require divorced and remarried mother who had custody of 16-year-old boy and 13-year-old girl who for more than 5 years had been using the same surname as their remarried mother to take all available steps to cause children to be known in school and elsewhere by their father's surname, in view of the realities of the situation and the views of the children who had good relations with their father who had not raised serious objection as to use of remarried mother's new surname until the trial.

*539 Jean M. Boardman, Washington, D. C., for appellant.

Philip Shinberg, Washington D. C., for appellee.

Before KERN, GALLAGHER and REILLY, Associate Judges.

GALLAGHER, Associate Judge:

Appellant, Mrs. Muriel Pressman Nellis, seeks reversal of an injunction ordering her to refrain from causing her children, Amy and Adam, to be known by any surname other than their father's, Mr. Howard Pressman (appellee). The facts are lengthy and complicated and require a rather full recital.

Mrs. Nellis was married to Mr. Pressman on March 25, 1951. During this marriage, which ended in divorce on October 18, 1964, two children were born. Adam is now 16 years old,[FN1] and his sister, Amy, is now about 13 and a half. [FN2] Shortly after the divorce, Mrs. Nellis married her present husband, Mr. Joseph Nellis, and since then she and the children have resided with him in the District of Columbia. The father, Mr. Pressman, resides in Chester, Pennsylvania.

FN1. He was born on October 8, 1955.

FN2. She was born on April 20, 1958.

In the fall of 1965 or 1966, Mrs. Nellis, without notifying Mr. Pressman and because Adam often told her of discomfort because his name was different from the Nellis family, enrolled the children in school with Adam's assent under her new surname. For the last five or six years Amy and Adam have continuously used the surname Nellis, except when visiting their natural father at his residence in Pennsylvania where they are known as Pressman. The earliest indication of an awareness by Mr. Pressman of the change in name is a letter *540 he wrote to Mrs. Nellis' attorney is Pennsylvania on October 31, 1967, concerning visitation rights in which he complained about 'changing my children's names in school to Nellis.'

On June 20, 1968, Mr. Pressman filed a suit for custody of the children. Subsequently, his complaint was amended to withdraw the custody demand and to request merely a final settlement of visitation rights; but no claim concerning the proper surname of the children was raised until the complaint was orally amended to include the issue at the beginning of the trial in June of 1970.

Neither child knew their name was an issue in the trial though both children participated in it and were questioned about the change in names. The court issued a judgment which, as well as fixing visitation rights, enjoined Mrs. Nellis from 'using, or allowing to be used, in any manner or circumstance whatsoever, any names for said minor children other than 'Adam Jay Pressman' for the male child and 'Amy Ellen Pressman' for the female child.' Mrs. Nellis received from the trial court a retrial on the issue of the children's surname, but applications by the children to intervene, filed by Mrs. Nellis as next friend, were denied.

The retrial took place in April 1971, with all interested parties and three expert witnesses testifying. Much of the testimony at the retrial centered on Adam's reaction to the order requiring that his mother effect a return to the name Pressman.

Since neither Adam nor Amy had been informed that their name was an issue at the original trial in June, Adam testified he was surprised as he read a copy of the trial court's opinion and order enjoining use of the name (he first saw the order on the weekend of his 15th birthday). His reaction was strongly adverse. During the next few days he had long telephone conversations with his father at his home in Pennsylvania concerning the injunction. They further discussed the question when Adam visited his father at Thanksgiving but did not arrive at any agreement. His opposition to a return to the name Pressman remained constant during the winter, and at the retrial he expressed an intense desire to retain his name as Nellis.

Adam said he has a deep interest in retaining his name as it is while his name is of little tangible benefit or detriment to his father. He had lived as Nellis so many years that to revert now to the Pressman surname would present grave problems for him and would cause him 'pain and anguish.' It seemed to him that his father was asking for a sacrifice which would result in little of appreciable significance for his father. He said that prior to the court order his relations with his father had been good-he loved him and enjoyed visiting him-but now he felt differently. He was afraid that if forced to return to the name Pressman he would not be able to develop any relationship with his father, and that he 'might just stop going to visit him.'[FN3]

FN3. In an affidavit for Mrs. Nellis on August 12 accompanying a motion to stay it is stated that Adam has refused to visit his father this summer despite the court order granting Mr. Pressman custody of the children for the months of July and August. Mr. Pressman declined to exercise his right and force Adam to visit him.

A child psychiatrist appearing for appellant supported Adam's opinion that he would be harmed by returning to the name Pressman. According to the expert testimony, Adam's motives for so strongly opposing Mr. Pressman go well beyond any mere inconvenience in explaining the change to friends. Rather, Adam now feels himself to be a Nellis because for five or six years during the critical and formative development of the adolescent he has grown up in the community as Nellis. Due to good family training,

> * * * (the children) made the best of the situation they have been in * * *. This is what they know. This is what they have put into it. They have made *541 their adaptations, and this is Adam right now. So, that, when you try to change his name, in my opinion, it's symbolic of trying to break him. He's a mature boy for his age of 15 and he is further along in this process.
>
> If this happened in other years, earlier, I would say probably his feelings would be different. But, now, his feeling toward his father is very troubled, because he would like his father to know that this is him now, and he would hope his father would want the relationship, the affection and respect, above a name change, because to the boy this is tied up with who he is. (Tr. at 255- 56.)

In opposing the children's return to the Pressman surname, Mrs. Nellis stressed the same factors of self-identity and relations with others which were brought out in the psychiatrist's testimony. She especially feared the effect that 'dislocation' might have on Adam at a point in his life where he was 'trying very hard to find a real place for himself in society, and aspiring to be something and to be someone.'

Although Amy was not as strenuously opposed to returning to the name Pressman as her brother, that is, she did not anticipate severing her relations with her father if she is required to use his surname, she did define her strong desire to retain her present status as Amy Nellis. She articulated her conviction that her best interest lay in maintaing the status quo and

maintained this position during searching cross-examination.

Mr. Pressman testified that the children's use of his surname was critical to the maintenance of a sound and durable relationship between himself and his children. He said it is not natural for children to carry their mother's name. He believed that the children were living in a 'dream world' in which they were or would in the future be embarrassed to even introduce their natural father to their friends. He felt that Adam's present hostility toward him because of the court order requiring a change back to the name Pressman can be altered by the enforcement of the injunction, though this means 'compulsion.'

In support of his position was a psychiatrist who testified children are better off, generally, in having their natural parent's name; that use of the surname Pressman was important to the children's relationship with their real father; that continued use of Nellis would, in effect, be a hiding from a reality which should be faced and dealt with; and that being an adolescent it is a good time to make the transition.

The trial court issued an order which once again enjoined appellant from causing the children to be known by any surname other than their natural father's.

We may say at the outset it is difficult to avoid the comment that this is an issue which it would have been more desirable to resolve, or at least attempt to resolve, without injecting it into a judicial proceeding. It would have been better if the mother had consulted with the father about the problem brought to her by her son before causing the name changes to occur in the lives of the children. On the other hand, it would have been better if the father had tackled the problem directly when he first became aware of the name changes no later than October 31, 1967. Not only that, it would certainly have been better judgment on his part to have first discussed his objections with the children, and the mother, rather than raise it directly for the first time five or more years later by way of an oral amendment to the complaint at the outset of the trial in this case. Having said this, the fact remains that the issue is before us for resolution. We may say that in deciding this case we at no time give consideration to any error in judgment by either parent-which parent was right or wrong-lest this becloud the real issue of the true interests of the children. Necessarily, though, the father's inaction for five years or more comes into play in assessing the fundamental issue, as we see it, but it is only in that context we consider it. We are aware of no appellate decision in *542 this jurisdiction on the problem involved, and counsel cite none.

It may be well first to clear away some of the underbrush and say what this case is not about. It is not a case involving a petition to change the names of children under the statutory procedure and where no change has yet occurred in actuality. D.C.Code 1967, ss 16-2501 to 16-2503. It is not a case where a name change in school records, etc., has occurred and the father promptly upon learning it protests and seeks an injunction before the new name takes hold. Mark v. Kahn, 333 Mass. 517, 131 N.E.2d 758 (1956). Nor does it involve a name change of children of tender years who clearly are not in a position to understand the implications or to convey their wishes with the intelligence and comprehension necessary to give weight to their testimony. Degerberg v. McCormick, 41 Del.Ch. 46, 187 A.2d 436 (1963). And, importantly, as we will see, neither is it a case where it need be considered that if their names are changed away from the father's name 'the bond (with the father) may be weakened if not destroyed.' Mark v. Kahn, supra.

The trial court posed the 'basic question' as being whether the 'substantial interest' of the children 'require(s) a change of name or whether their complaints fall into the 'category of inconvenience or embarrassment." The ultimate findings of the court were that (a) the best interests of the children do not require that they be known by the name Nellis, and (b) their substantial interests do not require a change of name from that of their natural father as his name is (1) 'not positively deleterious' to the children and (2) the natural father has been guilty of no misconduct justifying a forfeiture of his rights.

The principal error of the trial court, and the one which we believe led to a misjudgment of what constituted the real issue in the case, was in viewing the fundamental question presented as whether there should be a name change from the father's name (Pressman) to that of the stepfather and mother (Nellis). The actuality is that for all practical purposes the name changes took place at least five years ago,

realistically though not legally, and the problem here is whether another change back to the father's name should now take place. It seems to us that in reaching a decision in the particular circumstances of this case it would be wrong not to recognize the reality that name changes previously occurred even though the statutory procedure (D.C.Code 1967, ss 16- 2501 to 16-2503) for change of name was not pursued and no court approval was obtained. The fact is that in their daily lives their names have been Amy and Adam Nellis, and as the years went by this identity became more firmly imbedded in their minds and in the community where they live.

In its opinion, the trial court relied upon Mark v. Kahn, 333 Mass. 517, 131 N.E.2d 758 (1956) and Ouellette v. Ouellette, 245 Or. 138, 420 P.2d 631 (1966).

Mark, too, was a case of first impression and also involved an injunction sought by a natural father to prevent a divorced mother from registering their child in school in the name of the child's stepfather and mother. The court reversed an injunction and remanded the case for further proceedings because it concluded the trial court did not adequately consider the controlling issue of what was the best interest of the child but, rather, appeared to be unduly influenced by the motivation of the mother in seeking to effect the name change in school.[FN4] In so doing, the court laid down guidelines which we summarize:

> FN4. Similarly, we conclude the trial court here did not adequately consider what we find to be the controling issues. We note that here, too, the trial court in its opinion evidenced some concern about the mother's motivation, though the best interests of the children are the real issue.

(a) Children ought not to have another name foisted upon them until they reach an age when they are capable of making *543 an intelligent choice in the matter of a name.
(b) The bond between a divorced father and his children is tenuous at best and if their name is changed the bond may be weakened if not destroyed; and the name under which a child is registered in school goes far to effect a name change.
(c) When a father supports a child, manifests a continuing interest in him, is guilty of no serious misconduct and without unreasonable delay objects to an attempted change of name, the court should decide the issue by determining what is for the child's best interest.
(d) A change of name may not be in the child's best interest if the effect of such change is to contribute to a further estrangement of the child from a father who exhibits a desire to preserve the parental relationship.

Considered in their entirety, the court in Mark laid out essential tests going to 'the child's best interest.' Mark v. Kahn, supra, 131 N.E.2d 758 at 762.

We have no problem with those general guidelines. But we do not read those considerations as requiring the issuance of the injunction here because of largely undisputed evidence in this case. Here, the boy (Adam) is 16 years old, is highly intelligent (upper 2 percentile nationally), a member of the Key Club in his high school (civic and service organization) and has been invited to membership in Junior Achievement, a national arm of the Chamber of Commerce. His sister (Amy) is 13 years old and also very intelligent and mature for her age. She has been appointed to an Advisory and Film Evaluation Board on drug abuse as the only child representing her age group to that Board. Her function is to view films on drug abuse and from her age-group's standpoint evaluate them for the purposes of the relevance and credibility of the films for children. It would appear that in determining the best interests of the children, their views on their names are entitled to be weighed commensurately.

Secondly, it is not seriously disputed that there was a good relationship between father and child during all the years of the name change and, more particularly as to the boy, until notified about the entry of the injunction in this proceeding. Additionally, the court in Mark recognized a significant problem if an unreasonable delay ensues before the father objects to the name change.

The trial court also placed considerable reliance on Ouellette v. Ouellette, 245 Or. 138, 420 P.2d 631 (1966). There, the trial court upon complaint of the divorced father issued a decree preventing the mother from changing the names of their three children (ages 14, 13 and 9) from 'Ouellette' to 'O'Let.' On appeal, the court concluded appellant's position that (a) no change of name was involved but merely a change of spelling, (b) the new spelling was preferred by the children, and (c) the welfare of the children was furthered because

the new spelling was more convenient, was too lacking in substance to warrant consideration. In so deciding on those facts, the court stated that '(w)here the father, as here, objects to a change in name and is guilty of no inattention to the child or other misconduct so serious as to make it for the best interest of such child that his name be allowed to be altered, then the court should refuse to permit such change * * *.' Ouellette v. Ouellette, supra at 633.

In the circumstances of Ouellette, we would agree with the court's decision but we do not read it as persuasive here due to material factual distinctions. The issue here is more complex if only because of the five or more year lapse without direct action by the father, during which the names of the two children became imbedded in their community as Nellis.

On the other hand, in Bilenkin v. Bilenkin, 78 Ohio App. 481, 64 N.E.2d 84 (1945), *544 under circumstances quite similar to this case, the court declined to compel a mother to change a child's name on school rolls (and other places) back to the name of the divorced father. The court stated:

> The trial judge points out that this practice of registering the minor daughter of the parties in the name of Salesky had been followed from the time that the plaintiff had moved with her husband to their present residence. The home of the child is hundreds of miles removed from that of her father and it does not reasonably appear that he will be materially affected, one way or the other, by reason of the fact that his child there carries the name of Salesky. On the other hand, it may be very embarrassing and the source of some humiliation to the daughter if at this time the plaintiff should be required to no longer carry the daughter's name as heretofore known among her associates. Had the request been made of the Court when the facts first came to the attention of the defendant, it would present a different and more difficult question. (78 Ohio App. at 484-485, 64 N.E.2d at 85-86.)

We do not consider Mark and Ouellette as being worthy of the weight apparently given them by the trial court.

In our view, the issue is not as the trial court viewed it-whether a name change to Nellis is required-because this is the name they have been carrying for more than five years, and this without direct complaint by the father to the mother or children, and without meaningful action by him until the outset of the trial.[FN5]

> FN5. In evaluating the evidence bearing upon the real issue, the views of the mother are also entitled to consideration.

It is stated in the dissent that the father 'should not be blamed for the law's delay'; and that the father should not be 'charged' with permitting the name Nellis to become imbedded because for four or five years he has been taking 'all feasible legal steps' to stop the practice. But, as we have said, this is not a case for blaming anyone. Otherwise, the true issue of the children's best interests could get lost and they might become pawns. The fact remains the only 'feasible legal step', that is, application for an injunction, was not taken until June of 1970 notwithstanding that the father learned of the usage of the name Nellis sometime before October 31, 1967.[FN6] So there was no 'law's delay' actually involved. We do not take seriously in this context, as the dissent does, that the father at one time filed a complaint for custody of the children because (a) the *father is the first to say the children have been very* well raised by the mother and stepfather, and (b) perhaps for this reason, the complaint for custody was withdrawn before trial.

> FN6. In his letter of October 31, 1967 to a coarbitrator selected by the father and mother to work out visitation rights, Mr. Pressman stated his views on the visitation problem and remarked in conclusion that changing his children's names in school was not in aid of a good relationship between the children and him. We do not view this as a 'feasible legal step.'

We do not view this case as involving the traditional concept that the discretion of the trial court should not be disturbed unless an abuse of it is apparent. Rather, as we have said, the trial court has simply not evaluated the true problem in this novel case of first impression. In considering the real question posed, we believe that the record is sufficient to permit a final determination by this court of the issue rather than prolong this already protracted litigation.[FN7]

> FN7. There have already been two trials and, especially in the second trial which solely concerned the name change, all parties have given complete testimony. In

addition, three expert witnesses have testified.

Under the special facts and circumstances of this case, we think an injunction should not be issued requiring the mother to take all available steps to cause the children to revert to the name Pressman. We say this because (a) the children have been known in this community for more than five *545 years as Nellis and had a good relationship with their father during those years, (b) their name and identity as Nellis have become imbedded in their own minds as well, (c) the likely impact on their lives of changing back again after all these years to the name Pressman, (d) the children's views are entitled to serious consideration because of their ages and level of intelligence, (e) the reality that the son is approaching the age (18) when he will be eligible to vote and, if necessary, serve in the armed forces and is therefore not far from the time when his wishes on his name would be difficult to deny, (f) the effect the injunction has already had in their lives and on the relationship with their father, and (g) the father's physical remoteness from the communtiy where the children reside.

We agree that, generally speaking, children should carry the name of their natural father unless there are countervailing considerations which outweigh this. If this were a case where an injunction had been issued before the name of Nellis had taken hold, we might well be disposed to a different result. But here the lapse of time was so long things had reached the stage where there was presented an individual social problem not adaptable to solution by an injunction. Even though a court in equity may have jurisdiction, not every individual social problem presented to it should be considered subject to solution by judicial compulsion, and we think this is one now better left alone. We can only doubt that what the father apparently hoped to achieve by way of an injunction-assurance of a good and lasting relationship with his children-is in the power of any court to give.

In vacating the injunction, we are hopeful that the father's forebodings on his future relationship with his children if he does not prevail will not prove true. It may well be that the father and children, having bared their souls, will have a warm reunion and become closer than ever. They all seem to have the character, feeling and intelligence to do so.

Reversed with instructions to vacate the injunction.

REILLY, Associate Judge (dissenting).

In my view, reversal of the trial court in this case cannot be reconciled with leading decisions of this court in domestic relations matters. Until today, it had been our rule that unless the trial judge's findings of fact lacked evidentiary support or a clear abuse of discretion was shown, his decree should not be disturbed.[FN1] Obviously this is not the situation here, for (1) the subsidiary factual findings of the trial judge are not challenged, and (2) the reasons for his ultimate conclusion are set forth in two learned and lucid opinions, amply supported by citations to judicial authority.

FN1. Rutledge v. Harris, D.C.App., 263 A.2d 256 (1970), falls into the first category. There, a decree awarding the custody of children to a father was based upon a finding that 'there is no evidence indicating that (he) is an unfit person.' That decree was indeed reversed by this court but on the ground that the record revealed 'such factors as failure to support the children and previous parental indifference, possibly coupled with an ulterior motive to avoid support payments and gain the income from the social security payments * * *.'

This court has repeatedly held that even on such major controversies as disputed custody of children, a trial judge's disposition of the competing claims of divorced parents should be permitted to stand even though a reviewing court, or other trial judges, on the same record might well have reached a different result. Coles v. Coles, D.C.App., 204 A.2d 330 (1964). We strongly reaffirmed the principles enunciated in that opinion in a recent decision even though-in contradistinction to the case before us on appeal-no written findings were made by the trial judge. Dorsett v. Dorsett, D.C.App., 281 A.2d 290 (decided September 22, 1971.)

Dorsett was also a case where the trial judge decided that the father should be the guardian of a child of tender years *546 despite a concession that the mother was not an unfit person and a general presumption that as between divorced parents the child is better off with the mother. In refusing to substitute our judgment for that of the trial court, we quoted with approval the observation of Chief Judge Hood in the Coles case.[FN2]

FN2 Id., 204 A.2d 330 at 331-332.

Since what has been termed the classic decision on the subject, Chapsky v. Wood, 26 Kan. 650 (1881), most jurisdictions, including this jurisdiction, have accepted Judge Brewer's pronouncement that in child custody cases: 'Above all things, the paramount consideration is, what will promote the welfare of the child?' This principle is easily stated but its application in a particular case presents one of the heaviest burdens that can be placed on a trial judge. Out of a maze of conflicting testimony, usually including what one court called 'a tolerable amount of perjury,' the judge must make a decision which will inevitably affect materially the future life of an innocent child. In making his decision the judge can obtain little help from precedents or general principles. Each case stands alone. After attempting to appraise and compare the personalities and capabilities of the two parents, the judge must endeavor to look into the future and decide that the child's best interests will be served if committed to the custody of the father or mother. He starts with the premise, as did the trial judge here, that the best interests of the child would be served by living in a united home with the affection, companionship and care of both father and mother, but that possibility has been eliminated before the case reaches judge. So, the question for him is what is best for the child within the limitations presented. When the judge makes his decision, he has no assurance that his decision is the right one. He can only hope that he is right. He realizes that another equally able and conscientious judge might have arrived at a different decision on the same evidence. (Footnote omitted.)

In the instant case, the only matter raised on appeal concerns the surname to be used by children of divorced parents. Obviously such an issue pales in comparison with the problem posed to a trial judge by the selection of the particular divorced parent to whom the custody of a child should be entrusted. If the determination of such a question with all its serious and long range impact upon a child's future properly rests at the discretion of the trial judge who has heard the testimony and appraised the character and personalities of the persons involved, it is difficult to justify the intrusion of an appellate body upon a trial judge's disposition of a relatively trivial question.

Nevertheless, my colleagues hold that traditional deference in domestic relations cases to the judgment of the trial court is not warranted here because of an asserted failure on the part of the court below to evaluate the real issue. This, we are told, is not the question of whether there should be a name change from Pressman (the father's name) to Nellis (the name of the second husband), but rather whether another change back to the father's name is required, inasmuch as 'for all practical purposes' the children's surname was changed to Nellis at least five years ago.

Pointing to the leading case of Mark v. Kahn, 333 Mass. 517, 131 N.E.2d 758 (1956) (where a divorced wife was being sued for registering her children at school under the name of her new husband), they say that the trial court erred in deeming this case a precedent because one of the guidelines laid down by the Massachusetts Supreme Court in that decision was that the father, who is supporting the child, is entitled to the kind of relief granted below if he 'without unreasonable delay objects to an attempted change of name'. According to the majority, the guidelines of the Massachusetts case were disregarded *547 because the father here raised no timely objection until the name change had become 'embedded' by five years or more of usage.

I cannot understand how this conclusion was reached for the record refutes any notion that appellee Pressman slept on his rights or was dilatory in any respect, once he learned the children were going under another name in Washington. Appellant never notified her former husband of the steps she had taken to bring about this situation and the record indicates that he was not aware of it until October 31, 1967. On that date he sent a letter to the lawyer who had negotiated the original custody agreement on behalf of the wife, warning that he considered this action a breach of their agreement.[FN3] Not getting any satisfaction and being further aggrieved by what he deemed a denial of visitation rights, he then suspended making support payments directly to the wife, but deposited the money to the children's account in a Pennsylvania bank.

FN3. There can be little doubt that this letter was transmitted to the wife, for her own trial lawyer in this case produced it when the first husband was on the stand.

The impasse continued and on June 17, 1968 he brought an action in the Court of General Sessions asking that permanent custody of the children be awarded to him (R. 326, 334). In this posture of the case it was scarcely necessary to put the mother on notice again that he was protesting her discontinuance of the use of his name by the children, for if he had succeeded in obtaining custody of them he obviously would have remedied the matter himself.

Thus it is incorrect to say that until the commencement of the trial on June 24, 1970 the surname issue was never directly raised. It was when the request for full custody was deleted from the complaint that the prayer was amended to request injunctive relief against the mother with respect to the name change. The lapse of an additional year and a half since that date has been entirely due to the success of the mother in obtaining a rehearing after the relief sought by the amended prayer was granted and the further time required to perfect her appeal. Except for a period of approximately a year when the application of the Nellis name to his children was unknown to him, the father, the mother has persisted in her course of action with full notice of her former husband's legal challenge to it. Obviously the father should not be blamed for the law's delay,[FN4] nor should he be charged with permitting the name Nellis to become embedded in the children's lives in the community for five years, when for four of those five years he has been taking all feasible legal steps to stop the practice.

FN4. At oral argument, appellee's counsel said that it was through his own inadvertence and not Pressman's that injunctive relief against use of the Nellis name was not included in the 1968 complaint. But as the suit was one for custody, such a request would have been surplusage.

Another guideline in Mark v. Kahn, supra, is that the kind of father entitled to relief should be one 'who supports a child, manifests a continued interest in him, (and) is guilty of no serious misconduct * * *' Certainly the plaintiff in this case meets these criteria. It is conceded that his standing in his own community is good and that since the divorce the children's holidays from school, and summer vacations, have been spent with him at his Pennsylvania home or his summer place in Atlantic City. So far as support is concerned, he has been more than generous. Having voluntarily entered into a post-divorce agreement to pay $100 a month per child, plus medical expenses, he has not appealed a decree of the lower court raising this amount to $400 monthly for the children and granting the wife $4,000 for legal expenses in the custody suit. The father is a man of moderate means; his total income before taxes being $20,600 in 1967, $15,600 in 1968, and $25,600 in 1969.

*548 The majority opinion also seems to ignore another 'essential test going to the child's best interest' which was formulated in the Kahn case and summarized by the majority as follows:[FN5]

FN5. Mark v. Kahn, supra at 762.

> Children ought not to have another name foisted upon them until they reach an age when they are capable of making an intelligent choice in the matter of a name.

This is precisely what happened to the children here as a result of the mother's actions when they were only age ten and five, respectively. The record makes it clear that it was the divorced wife, and not the children, who conceived and carried out the program for letting the children be known to their Washington acquaintances as Nellis rather than as Pressman, despite her denials on cross-examination that she had encouraged the children to use their stepfather's name.[FN6]

FN6. The trial court also found that 'she had caused the children to be enrolled in schools and camps and the son to receive his Bar Mitzvah in said surname'. R. 356.

According to the son's testimony at the first hearing when he started to go to school in Washington (shortly after the mother's remarriage), his mother expressed resentment because schoolmates would call and say, 'Mrs. Pressman, is Adam there?' She then suggested that he change his name to Adam Nellis,[FN7] thus avoiding the necessity of having to explain why his name and his mother's were different. Evidently the son was reluctant to go along, for he testified that the 'first few times I said I didn't want to' and it was not until he 'thought about it a long time' that he acquiesced.[FN8]

FN7. Excerpt from proceedings of June 25, 1970, 3-4.

FN8. Id. 20. Obviously the ante litem motam testimony

of the children at the first trial where neither was on notice of the surname controversy is a vastly more trustworthy guide to the facts and their attitudes than their subsequent testimony.

In effectuating the daughter Amy's change of name, the mother's approach was even more direct. Amy's first knowledge of the subject occurred when her teacher made such an announcement in the classroom of the school where Amy was a second grade pupil. She later learned that her mother had telephoned to say that she wanted her daughter's name changed.[FN9] Amy also testified that so far as she was personally concerned, the name by which she was called did not really matter.[FN10] Also illustrative of the mother's attitude with respect to allowing the children to maintain ties with the father is the fact that on the eve of this litigation, Amy had to 'sneak out of the house' to post a letter to him.[FN11] On one occasion the mother attempted to find some pretext for cutting short the children's summer sojourn with him at Atlantic City, and on another occasion when the father was in Washington, she refused to let the children dine out with him.[FN12]

FN9. Id. 43-44.

FN10. As Amy's subsequent view of the matter is referred to in the opinion, the following excerpt from the transcript of the first trial is revealing (id. 44-45):

Q Let me ask you this, Amy. If you had your own way about it and didn't have to do what somebody else told you to do, would you rather use the name Pressman than the name Nellis?

A I don't really know. I don't think it really matters, but I don't think my name was changed legally.

Q You don't think it was changed legally?

A I don't know, but I don't remember anything happening.

Q So you feel that your name is really still Pressman no matter what somebody might call you; is that right?

q Yes.

Q You don't mind it being Pressman? You don't mind being known as Pressman rather than Nellis?

A No, sir.

FN11. Id. 33-35, 53.

FN12. Id. 24-25, 46, 26-28, 39.

*549 Such incidents not only suggest an explanation of why Amy's attitude toward continued use of the Nellis surname shifted between the first and second trials, but also support the soundness of the trial court in applying to this case the Massachusetts doctrine that the 'bond between a father and his children in circumstances like the present is tenuous at best and if their name is changed that bond may be weakened if not destroyed'.[FN13]

FN13. Mark v. Kahn, supra at 762.

Moreover, some other aspects of the record persuade me that the trial judge's decision was correct. Disapproval of his decree places a premium upon the use of extra-legal methods with respect to name changes. For if the majority opinion is correct in stating that the name change of the children had already occurred (i. e., from Pressman to Nellis) before the case reached the lower court, it also follows that the person responsible for this fait accompli-the mother-disregarded the only two methods prescribed by statute in this jurisdiction for acquiring a different surname.

One method would have been for the mother as 'parent, guardian or next friend' to have filed an application in the Superior Court on behalf of the infants involved setting forth the reasons for the desired name change as provided in D.C.Code 1967, ss 16-2501 to 16-2503 (Supp. IV, 1971). Another would have been for the stepfather, who is being held out in local circles as the natural father of the children, to have instituted adoption proceedings. D.C.Code 1967, s 16-301 ff., in which event the family name of the adoptees would have become that of the adopter under s 312(c) of that title.

If either legal course of action had been followed, the real father would have been entitled to appear in opposition to such petitions. Thus the prospect of judicial approval for either type of petition might well have been slim. This does not strike me, however, as justifying a party before us to reap the reward of conduct which flies in the face of public policy as set forth in acts of Congress.

Accordingly, I have some reservations about the majority insistence upon the total irrelevance to the issue of any consideration of which parent was at fault, although I agree with the view that in litigation of this sort, the welfare of the children is the paramount

consideration. The written opinion of the trial judge, however, discloses that he was also guided by this very principle, for he expressly found that it was not necessary 'for the best interest of the children' that they should be allowed a different surname.

Nevertheless, it must be remembered that the only litigants in this case are the divorced husband and wife-the children not being represented by a guardian ad litem or even a lawyer appointed to protect their interests.

So far as the impact of the lower court's decision upon the children's interest is concerned, it is apparent that the finding that Amy 'would not be particularly disturbed should she be required to use her father's name' is fully supported by the record. It is true that the son, Adam, strong objects to the trial court's decree, but I am not persuaded that it is reversible error for a trial judge to reject the notion that the true interest of an adolescent of 15 is best served by letting him have his own way-particularly on an issue so important to proper filial attitudes as his present repudiation of the name of an affectionate father whose liberal financial support he seems quite willing to accept.

To be sure, his mother and the two professional witnesses retained by her predicted a calamitous effect on the boy unless the injunction were vacted, viz., (1) that his relationship with his blood father would be jeopardized, and (2) that he would suffer a loss of identity which would cause him embarrassment among his contemporaries. ***550** The sincerity of the first prediction-coming from the source it did-scarcely commands respect. Nor is the 'identity' consideration a compelling one. It assumes that it is desirable to continue letting the boy live in a world of illusion rather than accepting the real fact of his heredity.

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The evidence in this case is that the child's mother wants the child's surname changed but the child's father does not. The father testified that he does not care what name the child uses of her own volition but doesn't want her forced or coerced to use the name "Waller".

Mary Beth herself did not testify but several people testified about their discussions of this name-change with Mary Beth, including two very reputable and qualified psychologists.

All of the evidence seems to indicate that Mary Beth is currently very disinterested (she said "bored") in all of the adult interest in her surname and somewhat puzzled by it. Apparently she uses the name "Waller" around Dade City and the name "Azzara" when she is with her father. It also appears clearly that she warmly loves her mother, her father and her step-father, and feels very secure in their love for her. She refers to both her father and her step-father as "Daddy" and when she feels it necessary to distinguish between them refers to her father as her "Daddy in New York" and her step-father as her "Daddy here".

One of the psychologists, Dr. Sidney Merin, testified that in his opinion the best interests of the child would be served by changing her name to "Waller". He also testified that it was his professional philosophy that all children should have the same name as the family they live with. He believes that children with a different name means something is wrong and therefore feel guilty.

The other psychologist, Dr. Robert Kline, testified that in his opinion it would not be in the best interests of the child to change her name. In his opinion changing the child's name to Waller would cause estrangement from her natural father and would eliminate her current freedom to use either the name "Waller" or the name "Azzara" as she chooses. Dr. Kline believes that Mary Beth's discretion to use the surname of either "Waller" or "Azzara" should remain unfettered by either judicial pronouncement or parental pressure. In his opinion: "She knows that she has two names that represent the families she loves very much."

Although not as authoritative as the pronouncement of the Third District Court of Appeal in Lazow, supra, the English playright [sic], William Shakespeare more poetically discussed the value of a surname in his play Romeo and Juliet. In scene two *279 of that play, he has Juliet Capulet say to Romeo Montague (Though she does not know that Romeo is listening):

"O Romeo, Romeo! wherefore art thou Romeo?
Deny thy father and refuse thy name:
Or, if you wilt not, be but sworn my love,
And I'll no longer be a Capulet.
'Tis but thy name that is my enemy;
Thou art thyself, though not a Montague.
What's Montague? It is nor hand, nor foot,
Nor arm, nor face, nor any other part
Belonging to a man. O, be some other name!
What's in a name? That which we call a rose
By any other word would smell as sweet;
So Romeo would, were he not Romeo call'd,
Retain that dear perfection which he owes
Without that title, Romeo, doff thy name,
And for thy name which is no part of thee
Take all myself."

However, although for young Mary Beth and the fictional Juliet, surnames may be unimportant or even sometimes a nuisance, for adults surnames are an important part of identity. Dr. Merin seemed to believe that changing Mary Beth's surname now was of diminished importance because she is a girl and will change her name by marriage in a few years in any event. But Mrs. Waller belied the diminished importance of surnames to girls when she testified--with justifiable pride--that her name is "Jane Huckaby Waller". Furthermore, not all modern girls adopt the name of their husband when they marry.

Therefore, after careful consideration of the evidence, this Court finds that the evidence does not establish that a change of Mary Beth's surname is necessitated by the welfare of the child. Nor does this Court find any justification to enjoin Mrs. Waller from requiring or persuading Mary Beth to use the surname "Waller". It appears that Mrs. Waller wants Mary Beth to use the surname "Waller" and Mary Beth knows that, but except perhaps for that sign on her front door welcoming home "Mary Beth Waller" she has been very circumspect in expressing that desire to Mary Beth.

Furthermore, this court finds that it would be contrary to the best interests of Mary Beth for this Court to do anything at this time that would in any way fetter Mary

Beth's freedom to use whichever surname with which she feels the most comfortable. When her surname becomes important to her, she can decide this issue for herself and leave this Court to decisions with which it feels much more comfortable.

It is therefore

ADJUDGED that the Petition for the change of the surname of Mary Beth Azzara and the Petition for an injunction prohibiting Mrs. Waller from requiring or encouraging Mary Beth Azzara to use the surname "Waller" both are hereby denied and all parties may go hence without day

DONE AND ORDERED in Chambers, Dade City, Pasco County, Florida, this 22 day of November, 1985.

/s/ Wayne L. Cobb,

Circuit Judge

Implicit in the final judgment is a recognition that the child's best interests have been served by her mother and stepfather. We cannot disagree with the trial judge that this is a case in which justice presently is best served by not imposing a judicial solution to a dispute.

Affirmed.

DANAHY, C.J., and FRANK, J., concur.

END OF DOCUMENT

ADDENDUM B
SELECT UTAH CASES

BREUER-HARRISON, INC., Casper J. Breuer and William Harrison, Plaintiffs and Appellees,
v.
Keith and Evelyn COMBE, Defendants and Appellants
and
Robert E. Froerer, Attorneys' Title Guaranty Fund, Inc., Clair C. Combe as Trustee for Philip Combe, Defendants and Appellees.
Keith and Evelyn COMBE, Clair C. Combe as Trustee for Philip Combe, Plaintiffs and Appellants,
v.
Casper J. BREUER and William M. Harrison, Plaintiffs and Appellees.

No. 880353-CA.

Court of Appeals of Utah.

Sept. 24, 1990.

Rehearing Denied Oct. 15, 1990.

Real estate purchaser brought action against vendor for rescission, and vendor cross-claimed against title insurer for negligence. The Second District Court, Weber County, Ronald O. Hyde, J., entered judgment for purchaser and insurer, and appeal was taken. The Court of Appeals, Greenwood, J., held that: (1) vendors who could not convey unencumbered fee title to property as promised, upon discovery that water district had irremediable pipeline easement, were guilty of anticipatory breach of contract, thereby entitling purchasers to rescission, and (2) neither title insurer nor searching attorney could be held liable to vendor for negligence in failing to discover irremediable easement.

Affirmed in part, reversed and remanded in part.

Orme, J., concurred in part, dissented in part and filed opinion.

[1] CONTRACTS⚿ 313(1)
95⚿313(1)
Action may be maintained for breach of contract based upon anticipatory repudiation by one of the parties to the contract.

[2] VENDOR AND PURCHASER⚿ 159
400⚿159
Vendors who could not convey unencumbered fee title to property as promised, upon discovery that water district had irremediable pipeline easement, were guilty of anticipatory breach of contract, thereby entitling purchasers to rescission

[3] VENDOR AND PURCHASER⚿ 159
400⚿159
Purchaser's options upon vendor's anticipatory breach of contract are to treat entire contract as broken and sue for damages, treat contract as still binding and wait until time arrives for its performance and at such time bring action on contract, or rescind contract and sue for money paid or for value of services or property furnished.

[4] VENDOR AND PURCHASER⚿ 138
400⚿138
Even if purchaser had knowledge or constructive notice of irremediable easement, vendor providing warranty deed would still be subject to statutory covenant against encumbrances. U.C.A.1953, 57-1-12, 57-3-2.

[5] VENDOR AND PURCHASER⚿ 143
400⚿143
Real estate purchaser did not waive vendor's anticipatory repudiation by continuing to make payments and exploring development possibilities after learning of irremediable easement for five years before asserting right of rescission; complete impact of easement was not known until further engineering work was completed, with purchaser attempting to mitigate damages by looking for alternative ways of developing property.

[6] VENDOR AND PURCHASER⚿ 143
400⚿143
Purchaser's five-year delay after learning of irremediable easement and seeking rescission of contract for vendor's anticipatory breach did not warrant finding of estoppel or laches absent evidence that purchaser made any admissions, statements or acts inconsistent with rescission claim it eventually asserted; delay was due to purchaser's efforts to mitigate damages and not because it was relinquishing later-asserted claim of rescission.

[7] VENDOR AND PURCHASER⚿ 145
400⚿145
Vendor's obligation under real estate contractor to provide deed with no encumbrances on property would not be obviated by use of special warranty deed

[8] ATTORNEY AND CLIENT⚿ 105
45⚿105
Elements of legal malpractice action are establishment of attorney-client relationship, negligence on part of attorney, and damage to client proximately caused by such negligence.

[9] ATTORNEY AND CLIENT⚿ 64
45⚿64
Existence of attorney-client relationship is proved by showing that party seeks and receives advice of lawyer in matters pertinent to lawyer's profession; intent and conduct of parties is critical to formation of attorney-client relationship, and party's belief that relationship exists, unless reasonably induced by representations or conduct of attorney, is not sufficient to create confidential relationship.

[10] ATTORNEY AND CLIENT⚿ 64
45⚿64
Payment of attorney fees does not by itself determine whether attorney-client relationship exists, but is only one indicia.

[11] JUDGMENT⚿ 181(16)
228⚿181(16)
Issue of material fact as to whether attorney-client relationship existed between real estate vendor and attorney who prepared documents at request of purchaser precluded summary judgment for attorney in vendor's malpractice action; vendor thought attorney was acting as his attorney, attorney prepared documents consolidating title in vendor in preparation for transfer to buyer, and attorney's payment came from sale proceeds at closing.

[12] INSURANCE⚿ 155.1
217⚿155.1
Determination of whether title insurance contract is ambiguous is question of law.

[13] INSURANCE⚿ 146.1(2)
217⚿146.1(2)
Mere fact that parties disagree as to meaning of language contained in title policy is not sufficient to create ambiguity.

[14] INSURANCE⚿ 426.1
217⚿426.1
Title policy, described throughout as "owners" policy, insured only purchaser, and not vendor, even though policy insured "estate" and was not explicitly limited to purchaser's equitable estate, which was created by real estate contract.

[15] VENDOR AND PURCHASER⚿ 54
400⚿54
Executory contract for sale of real property converts vendor's interest to personalty; purchaser acquires equitable interest in property at moment contract is created and is treated as owner of land.

[16] ATTORNEY AND CLIENT⚿ 109
45⚿109
Neither title insurer nor searching attorney could be held liable to vendor for negligence in failing to discover irremediable easement where vendor did not know or even anticipate that title insurance would be issued until time of closing, and thus did not rely upon insurer's alleged representations.

[16] INSURANCE⚿ 426.1
217⚿426.1
Neither title insurer nor searching attorney could be held liable to vendor for negligence in failing to discover irremediable easement where vendor did not know or even anticipate that title insurance would be issued until time of closing, and thus did not rely upon insurer's alleged representations.

[17] TRIAL⚿ 3(3)
388⚿3(3)
Trial court did not abuse its discretion in bifurcating real estate purchaser's claims against vendor from vendor's cross claims against title insurer and ordering separate trials; only issue to be tried on purchaser's claim was amount of restitution to be paid as determined from fair market value of property, and vendor's cross claims against insurer were irrelevant to that issue.

[18] CONTRACTS⚿ 249
95⚿249
"Rescission" is restitutionary remedy which attempts to

restore parties to status quo to extent possible or as demanded by equities in case.
See publication Words and Phrases for other judicial constructions and definitions.

[19] VENDOR AND PURCHASER⚿ 123
400⚿123
Fair rental value of property, which purchaser owed to vendor after rescinding contract for vendor's anticipatory breach, was properly calculated based upon determination that highest and best use of property in its present condition was for agricultural purposes; interest on purchase price occurring during time purchaser had possession of property was inapplicable measurement in determining fair rental value in that it would not restore parties to their positions at time contract was executed and provide vendor with windfall.
See publication Words and Phrases for other judicial constructions and definitions.

[20] INTEREST⚿ 39(2.30)
219⚿39(2.30)
Purchaser rescinding contract on ground of vendor's anticipatory breach was not precluded from obtaining prejudgment interest by delay in exercising rescission rights, where delay was reasonable.

[21] INTEREST⚿ 30(1)
219⚿30(1)
Prejudgment interest awarded to purchaser upon rescission of real estate contract due to vendor's anticipatory breach should have accrued at statutory rate in effect at time contract was executed. U.C.A.1953, 15-1-1.

*718 John P. Ashton and Erik Strindberg, Salt Lake City, for defendants and appellants Keith and Evelyn Combe.

Jack L. Schoenhals, Salt Lake City, for plaintiffs and appellees Breuer- Harrison, Inc., Casper J. Breuer and William Harrison.

Theodore E. Kanell, Salt Lake City, for defendant and appellee Robert E. Froerer.

*719 David E. West and Bruce A. Maak, Salt Lake City, for defendant and appellee Attorneys' Title Guar. Fund.

Bernard L. Allen, Ogden, for plaintiff and appellant Clair C. Combe

OPINION

Before GREENWOOD, JACKSON and ORME, JJ.

GREENWOOD, Judge:

Appellants Keith and Evelyn Combe appeal the trial court's summary judgment for appellees, Breuer-Harrison, Inc. (B-H), Casper J. Breuer, and William Harrison, against the Combes for anticipatory repudiation of a real estate contract entered into by the parties. The Combes also appeal the trial court's summary judgment dismissing the Combes' cross claims against appellees Attorneys' Title Guaranty Fund, Inc. (ATGF) and Robert Froerer. We affirm in part and reverse and remand in part.

The property in question is an undeveloped parcel of approximately twenty acres located in south Ogden, Utah. It was originally part of a farm developed by Keith Combe's grandfather. In the early 1960s, the Weber Basin Water Conservancy District (Weber Basin), by condemnation proceedings, obtained a thirty-foot wide easement on the property and constructed a water pipeline within the confines of the easement. Sometime in the 1970s, Keith Combe's mother divided the property into four parcels, conveying a parcel each to Keith Combe and his three siblings. One of the parcels distributed to Keith Combe's siblings was held in a trust managed by First Security Bank (Bank).

In 1979, Breuer and Harrison, the sole stockholders in B-H, a California corporation, became interested in purchasing property in Utah for development projects. They contacted Steve Keil, an Ogden real estate agent, who showed them several large parcels of property in the Ogden area. One of the properties they examined was the property owned by Combe and his siblings. Keil, Breuer, and Harrison walked across the Combe property and examined the county plat maps and available demographic and economic data.

Sometime in August 1979, Breuer and Harrison entered into an oral agreement with Keil, Bruce Nielson, who owned the real estate firm where Keil worked, and Duane Bruce, another agent for the firm.

They agreed that Keil, Nielson, and Bruce would have a twenty-five percent equity interest in the Combe property after a proposed purchase. The three were to share with B-H the costs, expenses, and all required payments under the Combe contract. A "memorandum of understanding" outlining the terms of the agreement was drafted and signed by all five individuals sometime in December 1979.

In August 1979, Keil contacted Jay Anderson, owner of an engineering firm, Great Basin Engineering (GBE), and asked Anderson to sketch some subdivision layouts of the Combe property. To assist B-H in determining the suitability of the Combe property as a residential subdivision, GBE subsequently performed, prior to B-H's purchase of the property, a variety of engineering tasks, including extensive soil testing, on-site ground water analysis, runoff flow analysis, and placement of road alignment.

Anderson assigned the actual design sketch work to Charles Olsen, an engineer at GBE. Olsen first prepared a base sheet by tracing information from a Weber County topography map. The base sheet showed the property boundaries, surrounding subdivisions, streets, and a dotted line marked "Aqueduct," [FN1] crossing the property diagonally in a northwest direction. By placing tracing paper over the base sheet, Olsen prepared several different sketches.

> FN1. According to Anderson, the marking of "Aqueduct" on the base sheet was inappropriate since it was really an underground pipeline. Webster's defines "aqueduct" as a conduit or artificial channel for conveying water; one for carrying a large quantity of water which flows by gravitation. Webster's Third New International Dictionary 108 (1986). Webster's defines "pipeline" as a line of pipe connected to pumps, valves, and control devices for conveying, in part, liquids. Id. at 1722.

*720 Because of the aqueduct marking, Olsen assumed there was an easement and asked Anderson the size of the easement, since Olsen typically included such information on a drawing. Olsen testified in deposition that Anderson told him the information was not available, to just go ahead and prepare the sketches. Olsen made no further attempt to determine the size of the easement. He did, however, make allowance for the aqueduct or pipeline, by putting a roadway over the top of it on the plat maps. He also testified that had he known of the thirty-foot easement, he would have plotted it on the base sheet.

Anderson was aware of the pipeline since its installation on the Combe property in the early 1960s. He testified in deposition that the aqueduct marking was originally put on Weber County aerial surveys in 1963. At the time Keil contacted him in 1979, Anderson believed there was probably a twenty to thirty-foot easement that belonged to Weber Basin, but was unaware of the exact width. Anderson understood that a house could not be built on the pipeline but assumed that either a roadway or back lot line could be put on the pipeline. Prior to B-H's purchase of the Combe property, Anderson worked primarily with Keil.

From exhaustive testimony, it is clear that in September 1979, Keil was aware of what he considered a small waterline which traversed the Combe property. It is also clear that Keil did not learn of the pipeline easement until 1983. Keil testified in deposition that his recollection of what he knew of the waterline in September 1979 was hazy due to it being a "nonissue." He testified that the biggest concerns in his discussions with Anderson in the fall of 1979 regarding the Combe property involved sewage and drainage problems. Although the exact time is uncertain, sometime in September 1979, Anderson apparently talked with Keil about the waterline or pipeline and putting a roadway over it. Keil viewed the waterline as a minor problem in the development plans, one that could easily be accomodated by building a road over it to insure profitability. According to Keil, in 1983 he first learned of an easement and aqueduct, which he did not relate to the waterline because in his mind there was a significant size difference between the two. Anderson testified in deposition that he told Keil that the pipeline was relatively small compared to usual Weber Basin standards. He also testified that there was no way Keil would have known of the thirty-foot easement in 1979.

On September 19, 1979, a meeting was held with Breuer, Harrison, Keil, and Olsen in attendance. This was Breuer's and Harrison's first contact with GBE. The group reviewed Olsen's rough sketches and discussed the number of lots, location of road alignment, and water treatment, sewage, and drainage

problems. None of those in attendance at the meeting recall which sketches were analyzed. There is no evidence that the base sheet showing "Aqueduct" was shown to Breuer, Harrison, or Keil. Breuer and Harrison testified in deposition that an easement was not discussed at the meeting and that the first they heard of the pipeline and easement was in 1983. Olsen had no recollection of what was discussed at the meeting. Keil testified to having no independent recollection of ever talking with either Breuer or Harrison regarding a waterline or pipeline either at this meeting or at any time prior to 1983, but only conjectured that a waterline was probably a topic of conversation at some time. He specifically testified that he did not discuss with Breuer or Harrison an easement at any time prior to 1983.

Sometime in the fall of 1979, Keil contacted Robert E. Froerer, an Ogden attorney, and asked him to do certain legal work in connection with a real estate transaction involving property in Ogden. Froerer prepared the necessary legal documents, deeds, and exchange agreements, that enabled a series of property trades between Keith Combe and his siblings so that Keith Combe and the Bank would end up with the entire property. Froerer also drafted a preliminary purchase agreement which was executed by B-H on approximately November 1, 1979. Froerer then prepared a real estate contract for the Combe property which established a sales price of $410,880 *721 and required a down payment of $75,000. Beginning on December 31, 1980, and continuing for the next three years, B-H was to make annual interest-only payments. The balance of the purchase price was due in full on December 31, 1983.

Paragraph eight of the real estate contract required the Combes and the Bank to warrant title to the property, to furnish a title policy, and to convey the property by warranty deeds. The paragraph was nearly identical to paragraph fourteen in the preliminary purchase agreement. Paragraph eight of the contract reads as follows:

> Seller warrants that there are no liens or encumbrances on the property herein-above described and agrees to furnish to Buyer at Seller's expense a title policy showing good and marketable title in said property (said title policy to be furnished at the time of the receipt of down payment from Buyer). Further, Seller agrees to execute and deliver to Buyer, or assigns, good and sufficient warranty deeds covering title to the above-described property when subdivided and as paid for in accordance with the terms hereinabove set out.

Paragraph four required that an escrow account be set up, that the Combes convey title by warranty deed to an escrow agent to be named later, and that this agent convey title to B-H by special warranty deed as payments were made. Paragraph five, which disclaimed warranties, stated: "The Seller hereby expressly disclaims any and all warranties and representations, express or implied, as to the state of the property, its condition, quality, character, or suitability or fitness for any sue [sic], whether existing or contemplated, matters of zoning, or in other respect."

Keil testified in deposition that on one occasion prior to the closing, he went with Keith Combe to the office of Combe's personal attorney, Paul Kunz. Kunz reviewed documents, including the preliminary purchase agreement, and made some changes. Keil further testified that Keith Combe was adamant about Kunz reviewing the documents prior to Keith signing anything.

The sale closed on December 29, 1979. Froerer was not present at the closing, but later obtained B-H's signature on the real estate contract and the down payment, and forwarded funds to the Combes and the Bank. Froerer withdrew payment for his fees for drafting the contracts, and for fees for a title search and policy, from the sale proceeds. An escrow account was never established and no preliminary title report was requested or issued prior to the closing of the sale. Keith Combe, in deposition, testified that he first learned that Froerer was going to issue title insurance at the closing. According to Froerer, the title search was probably started before the closing. The title policy was, however, not issued until November 14, 1980. The policy failed to make an exception for the pipeline easement. The underwriter on the policy issued by Froerer was ATGF. At the time, Froerer owned stock in ATGF and regularly researched titles and wrote title insurance for the company.

After the real estate contract was signed, GBE added sewers and utilities to the subdivision layout. GBE completed the final plat in January 1980, which placed

a roadway over the pipeline. In 1980, after a proposed sale of the property to a third party failed to materialize, the developers continued to develop their plans for the property, which consisted primarily of obtaining governmental approval for the subdivision. Most of the development work was done by Nielson, Bruce, and Keil.

On November 24, 1982, an amendment was executed by the parties, that gave the developers an additional two years to pay the principal balance of the purchase price. A second amendment was executed on January 3, 1983. This amendment deferred for six months payment of one-half of the $35,000 interest payment which had been due at the end of 1982.

In the spring of 1983, in the process of negotiating a concession for himself in the contract, Keith Combe visited Nielson's office, bringing a new title report with him. The report disclosed several easements that had not been disclosed on the title report issued by Froerer, including the *722 pipeline easement. Breuer, Harrison, Nielson, Brian, and Keil all testified that this was the first time they had heard of the pipeline easement. [FN2]

> FN2. The parties dispute as to when the Combes first learned of the pipeline easement. Breuer, Harrison, and Keil all testified that at their meeting with Keith Combe in August 1984, Keith Combe mentioned to them that he recalled his father telling him about the pipeline. Keith Combe testified in deposition, however, that he never knew there was a pipeline on the property prior to its disclosure in the 1983 title report. In trial, Keith Combe admitted recalling his father talking about the water conservancy district filing a condemnation action to take a portion of the property for an aqueduct easement.

Anderson testified in deposition that after the disclosure of the pipeline easement on the Combe title report, he discovered and communicated to Nielson that Weber Basin was more rigorously enforcing its pipeline easements. Anderson further testified that had he known in 1979 of a thirty-foot easement and the restrictions that are now enforced, he would have advised Keil that the property would be difficult to develop, the cost would be high, and that Keil should look for another piece of ground.

According to Anderson's testimony, the existence of the thirty-foot easement and its enforced restrictions prohibit developing the property. Apparently, Breuer and Harrison wanted to get out of the project after learning of the easement, but Nielson convinced them to continue developing ideas to work around the easement. Bingham Engineering explored and platted the concept of developing the property as a condominium project. According to Breuer and Nielson, the placement of houses over the easement would create special problems if a developer wanted to cross the easement with utilities; hamper efforts in gaining approval to dig around the pipeline; place restrictions on the backfill over the pipeline; require the property owner to make repairs to the pipeline; render fifteen feet of the property on either side of the pipeline unusable for anything except vegetation; and will likely require special bridging or a concrete cover to be placed over any portion of the pipeline that sits within a street.

Following disclosure of the easement in the new title report, Harrison, Breuer, and Nielson contacted Froerer to determine what he and ATGF intended to do to resolve the problem. Nielson also met with Keith Combe several times following the pipeline easement disclosure. Although Keith Combe was generally aware of the problems the easement presented, he opined that it was Froerer's problem and not his. Nielson never told Keith that the development would not proceed because of the easement.

In late 1983 or early 1984, the developers hired a new engineering firm, Bingham Engineering, to obtain "fresh ideas." The complete impact of the easement on the project was not known until Bingham Engineering had completed much of its work and the cost of continuing the project became prohibitive, particularly in light of disclosures about the width of the right-of-way and the depth of the pipeline.

Two additional amendments were executed between the parties in February 1984. The first stated that at least fifteen acres of the property would be developed as condominiums and partial payments would be made to the Combes as each unit was sold. Further, the Combes were required to subordinate their interest in part of the property so that the developers could obtain a construction loan. The second amendment further extended the final payment under the contract until December 31, 1988, if the developers had paid at least $120,000 in principal by the end of 1985.

In August 1984, Breuer and Harrison flew to Utah and for the first time personally met with Keith Combe and raised the option of rescinding the contract. Keith Combe refused to reduce the purchase price of the property to reflect its diminished value because of the easement. Shortly thereafter, B-H filed suit, seeking to rescind the contract and collect the money paid to the Combes on the contract.

The Combes filed cross claims against Froerer and ATGF. In their first cause of action, they sought damages against Froerer based upon his negligence as an attorney; *723 in their second cause of action, they sought damages against Froerer and ATGF based upon the issuance of the title insurance policy.

The trial court granted B-H's summary judgment motion against the Combes, ruling that the Combes had committed anticipatory breach of the warranties of title in the real estate contract. The trial court later granted summary judgment against the Combes dismissing their claims against Froerer and ATGF. A trial was held but was limited to determining the amount of restitution to be received by B-H from the Combes. On the day before trial, the trial court bifurcated B-H's claims against Froerer and ATGF, over the Combes' objection. The jury which was empanelled in an advisory capacity, was discharged, and the trial court in a directed verdict determined the restitutionary damages against the Combes. The Combes, including Keith's brother, Clair, were required to refund B-H $236,966.21, plus pay $133,192.64 in prejudgment interest. The court credited the Combes $7,500 for the fair rental value of the property as agricultural property.

On appeal, the Combes argue that the trial court erred in (1) awarding B-H summary judgment on their rescission claims; (2) summarily disposing of the Combes' cross claims against Froerer and ATGF; (3) ordering that B-H's damage claims against Froerer and ATGF be severed from B-H's claims for restitutionary damages against the Combes; and (4) calculating restitutionary damages and offsets.

The standard of review when considering a challenge to summary judgment is well settled. "A grant of summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." Ceco v. Concrete Specialists, Inc., 772 P.2d 967, 969 (Utah 1989); see also Utah R.Civ.P. 56(c). We construe the facts and view the evidence in the light most favorable to the losing party. Geneva Pipe Co. v. S & H Ins. Co., 714 P.2d 648, 649 (Utah 1986); Whatcott v. Whatcott, 790 P.2d 578, 580 (Utah Ct.App.1990). Further, when reviewing conclusions of law on a challenge to summary judgment, we review those conclusions for correctness, according no deference to the trial court's legal conclusions. Ceco, 772 P.2d at 969; Bonham v. Morgan, 788 P.2d 497, 499 (Utah 1989) (per curiam).

SUMMARY JUDGMENT: BREUER-HARRISON

Utah Code Ann. § 57-1-12 (1990) specifies the effect of a warranty deed as follows:

> Such deed when executed as required by law shall have the effect of a conveyance in fee simple ... with covenants from the grantor ... that the premises are free from all encumbrances.... Any exceptions to such covenants may be briefly inserted in such deed following the description of the land.

"An 'encumbrance,' as used in this section, is any right that a third party holds in land which constitutes a burden or limitation upon the rights of the fee title holder." Bergstrom v. Moore, 677 P.2d 1123, 1124 (Utah 1984). The Combes concede that the pipeline easement is irremediable. "A defect which, by its nature cannot be removed by the seller as a practical matter is one 'of such a nature that the vendor neither has title nor in a practical sense any prospect of acquiring it.' " Neves v. Wright, 638 P.2d 1195, 1199 (Utah 1981) (quoting Davis v. Dean Vincent, Inc., 255 Or. 233, 465 P.2d 702, 706 (1970)). Thus, there is no question that the pipeline easement in this case constitutes a substantial encumbrance on the fee title to the property within the meaning of the statute. See Bergstrom, 677 P.2d at 1125 n. 1 (one of the three easements constituting encumbrances was a thirty-foot easement traversing the property in favor of the Weber Basin Water Conversancy District, beneath which lay a thirty-six inch water line); see also Thackeray v. Knight, 57 Utah 21, 192 P. 263, 265 (1920) (an easement for a pipeline over the premises is an encumbrance).

[1][2][3] It is well settled that an action may be maintained for breach of contract based upon the anticipatory repudiation by one of the parties to the contract. Hurwitz *724 v. David K. Richards Co., 20

Utah 2d 232, 436 P.2d 794, 796 (1968). An anticipatory breach occurs when a party to an executory contract manifests a positive and unequivocal intent to not render its promised performance when the time fixed for it in the contract arrives. Id. The trial court determined that because the Combes could not convey unencumbered fee title to the property to B-H as required by the real estate contract, the Combes were guilty of anticipatory breach of the contract. We agree. Notwithstanding that no breach of the covenant against encumbrances will occur until the deed is actually delivered, [FN3] it plainly appears that because of the pipeline easement the Combes would not be able to perform their contract, constituting an anticipatory repudiation of the real estate contract.

FN3. Generally, a vendor is allowed a reasonable time to perfect title. Callister v. Millstream Assocs., Inc., 738 P.2d 662, 664 n. 5 (Utah Ct.App.1987).

The trial court correctly determined that rescission was the appropriate remedy for B-H. The Utah Supreme Court has clearly established that where an unexcepted encumbrance on a seller's title is irremediable and, as a consequence, the seller will not be able to fulfill its contract to convey title as described in the warranty deed, rescission is an appropriate remedy. Bergstrom, 677 P.2d at 1125; Neves, 638 P.2d at 1199; Thackeray, 192 P. at 266. [FN4]

FN4. Where there is an anticipatory repudiation, rescission of the contract is one of three options available to the non-breaching party in common law as well as under Utah law. The Utah Supreme Court has articulated these three options as follows:

1. Treat the entire contract as broken and sue for damages.

2. Treat the contract as still binding and wait until the time arrived for its performance and at such time bring an action on the contract.

3. Rescind the contract and sue for money paid or for value of the services or property furnished.

Hurwitz v. David K. Richards Co., 20 Utah 2d 232, 436 P.2d 794, 796 (1968).

1. Waiver

The Combes contend, however, that the trial court erred in granting summary judgment since a key unresolved factual dispute in this case is when B-H learned of the pipeline and easement. The Combes argue that viewed in the light most favorable to them, the record establishes that B-H or their local partners, Keil, Nielson, and Brian, knew of the pipeline and easement before they executed the contract with the Combes, since the drawings prepared by B- H's engineers showed the pipeline and easement. The Combes cite the trial court's acknowledgement in its order granting summary judgment that "[t]here is a dispute of fact as to the exact date at which the buyers became aware of the existence of the easement and became aware of the existence of the aquaduct [sic]." The Combes conclude if B-H knew or had notice of the pipeline and easement prior to execution of the real estate contract, it waived any rights of rescission for anticipatory breach of contract. See generally Callister v. Millstream Assocs., Inc., 738 P.2d 662, 664 n. 6 (Utah Ct.App.1987); 77 Am.Jur.2d Vendor & Purchaser § 120 (1975) (the rule that a vendee's notice of encumbrances upon the property does not relieve the vendor of the duty of removing the encumbrance, where he or she contracts to convey free of all encumbrances, applies only to removable encumbrances, not to unremovable encumbrances, such as building restrictions or restrictions on the use of the property).

Viewing the evidence in a light most favorable to the Combes, however, we find no genuine issue of material fact with regard to when Breuer and Harrison and their local partners learned of the pipeline and easement. The testimony of Breuer, Harrison, Nielson, and Bruce all clearly establish that they did not know of the pipeline or the easement until sometime in 1983. Keil was aware of what he termed a "waterline" prior to the execution of the real estate contract, but considered it only a minor impediment to the development of the property for housing units. Keil testified that he never disclosed the waterline to Breuer or Harrison and that he also did not learn of the easement until 1983. Even *725 after exhaustive discovery and deposition testimony, the evidence does not contradict or cast any doubt on the developers' testimony. Breuer and Harrison walked across the property but, according to Anderson, neither the pipeline nor any physical manifestations of the pipeline were visible to the eye. Although "Aqueduct" was marked on the base sheet prepared by Olsen, there was no plat map or sketch created by GBE prior to 1983 that disclosed the existence of an easement. There is no evidence that prior to executing the contract, Breuer or Harrison saw

the base sheet or any sketches traced from the base sheet showing the pipeline. Anderson's and Olsen's testimony reinforce our conclusion that GBE did not fully appreciate the ramifications of the pipeline easement and never communicated to B-H the existence of a pipeline easement. Admittedly, the trial court found in dispute the exact date that B-H learned of the pipeline easement. However, because B-H clearly did not learn of the easement until well after the execution of the contract, this dispute does not involve a material fact. Because there is no genuine issue of material fact that B-H lacked knowledge of the pipeline on or before December 31, 1979, we find that it did not waive any rights to title without encumbrances when it executed the contract with the Combes.

[4] Even if B-H had knowledge of the irremediable easement or, as the dissent postulates, constructive notice under Utah Code Ann. § 57-3-2 (1990), the Combes would still be subject to the statutory covenant against encumbrances under section 57-1-12. In Bergstrom v. Moore, 677 P.2d 1123 (Utah 1984), the Utah Supreme Court noted that the unexcepted encumbrances on appellants' title, which included, as in this case, the Weber Basin waterline easement, which presumably was duly recorded, were irremediable. Although the supreme court found that it was undisputed that respondent had no knowledge or notice of at least one of the easements, the court stated that "[e]ven if respondent knew of some of the easements (as claimed by appellants), mere knowledge of encumbrances of this nature would not be sufficient to exclude them from the operation of the statutory covenant against encumbrances." Id. at 1125.

[5] The Combes assert, however, that even if the developers did not learn of the pipeline and easement until 1983, their five-year delay in asserting rescission for the Combes' anticipatory breach raised additional factual issues of waiver that could not be resolved by summary judgment. The Combes contend that during this five-year period, B-H reaffirmed its commitment to the contract by (1) paying annual interest payments, (2) hiring a new engineering firm to explore fresh ideas of developing the property, and (3) Nielson telling Keith Combe that B-H would hold only ATGF and Froerer liable for the breach and would honor the terms of the contract.

An original feature of the English doctrine of anticipatory breach was that a party continuing performance in the face of an anticipatory repudiation thereby waives the repudiation and can only sue on a subsequent breach, if any, occurring at the time when performance is due. 4 Corbin on Contracts § 981 (1951). The modern rule, however, "is that an innocent party, confronted with an anticipatory repudiation, may continue to treat the contract as operable and urge performance by the repudiating party without waiving any right to sue for that repudiation." United California Bank v. Prudential Ins. Co., Etc., 140 Ariz. 238, 681 P.2d 390, 433 (Ct.App.1983); see, e.g., Upland Indus. Corp. v. Pacific Gamble Robinson Co., 684 P.2d 638, 643 (Utah 1984); see also 4 Corbin § 981 at 938-39.

The basis for the modern rule, as the Combes point out in their reply brief, is to give the breaching party the opportunity to cure the breach before the time for performance is due. A party that has received a definite repudiation from the breaching party to the contract should not be penalized for its efforts to encourage the breaching party to perform its end of the bargain. United California Bank, 681 P.2d at 433. The repudiating party has a power of retraction as long as there has been no substantial *726 change of position by the injured party and the nonbreaching party's continuing to urge performance may be properly held to keep this power of retraction alive. 4 Corbin § 981 at 939.

The Combes contend that the rationale for the modern approach to anticipatory breach of contracts is inapplicable to the rescission remedy as used in this case. Because the easement is incurable and they are unable to perform their end of the bargain, the Combes assert that there was no legal or rational basis to allow B-H to stall in rescinding the contract until the contract became unprofitable. In sum, the Combes argue that the executory real estate contract became no different than one on which performance had become due at the moment that B-H discovered the easement. At that point, B-H should have made an election, which they in effect did, argue the Combes, by affirming the contract.

The Combes' argument that the nonbreaching party, in appropriate circumstances, ought to rescind without delay, in order to be able to mitigate damages, is admittedly persuasive. See University Club v. Invesco Holding Corp., 29 Utah 2d 1, 504 P.2d 29, 30 (1972)

("where one party definitely indicates that he cannot or will not perform a condition of a contract, the other is not required to uselessly abide time, but may act upon the breached condition. Indeed in appropriate circumstances he ought to do so to mitigate damages."). However, even though the pipeline easement was incurable, the circumstances in this case did not demand immediate rescission of the contract by B-H. The complete impact of the pipeline easement was not known until further engineering work was completed and the development cost of the property became prohibitive in light of the pipeline easement. Further, although a plummeting real estate market may have precipitated B-H's decision to rescind the contract, contrary to the Combes' representations, the record is clear that B-H did not just sit on its rights following the disclosure of the easement. B-H, through the efforts of Nielson, appropriately sought ways to mitigate the damage caused by the pipeline by attempting to develop the property in other ways. Although in hindsight, B-H would have saved both parties considerable expense had it rescinded the contract immediately upon disclosure of the easement, it is sound policy to not blindly require a non-breaching party to rescind immediately upon discovering the anticipatory breach. Even where the breach cannot be repaired, a non-breaching party may appropriately attempt in good faith to mitigate damages by attempting to honor the contract and work around problems presented by the breach.

2. Estoppel/Laches

[6] The Combes also contend that B-H's delay in exercising its rescission rights raised material factual issues of estoppel and laches not properly resolved by summary judgment. The Combes assert that only when real estate values plummeted in 1987, did B-H seek rescission. This delay, posit the Combes, precluded them from reselling the property, prior to the decline in property values, for an amount that would have made all parties whole.

We have stated that

> [b]efore equitable estoppel may be applied, three elements must be present: 1) an admission, statement, or act inconsistent with the claim afterwards asserted; 2) action by the other party on the faith of such admission, statement, or act; and 3) injury to such party resulting from allowing the first party to contradict or repudiate such admission, statement, or act. Successful assertion of laches requires defendant to establish that plaintiff unreasonably delayed in bringing an action and that defendant was prejudiced by that delay.

Utah Dep't of Transp. v. Reagan Outdoor Advertising, Inc., 751 P.2d 270, 271 (Utah Ct.App.1988) (citation omitted) (emphasis added).

We find that the Combes failed to demonstrate a factual dispute regarding the first element of estoppel: i.e., an admission, statement, or act inconsistent with the claim afterwards asserted. Contrary to *727 the Combes' representation, we do not find anything in the record of the summary judgment proceeding suggesting that Nielson told Keith Combe that they would look only to the title company and Froerer for any liability for the pipeline and that B- H would honor the terms of the contract even with the easement. As we have stated, B-H's delay in exercising its rescission rights was due to its efforts to mitigate damages due to the pipeline and easement, not because they were relinquishing their later-asserted claim of rescission. Further, since the delay was a reasonable attempt to work around the easement, we reject the Combes' laches claim.

3. Contractual ambiguities

[7] The Combes also argue that the trial court improperly resolved factual issues created by ambiguities in the real estate contract concerning the scope of warranties of title given by the Combes. The Combes assert that if the unnamed escrow agent, in accordance with paragraph four of the real estate contract, was to convey title by special warranty deed to B-H, such would not cover the pipeline easement created before the Combes took title. This argument is meritless since the Combes are clearly obligated under the real estate contract to provide a deed with no encumbrances on the property and a special warranty deed could not obviate that requirement. The Combes also contend that the warranties of title in paragraph eight conflict with the disclaimer of all warranties in paragraph five. We find, however, that the "as is" provisions contained in paragraph five relate to the physical condition of the property and have nothing to do with warranties of title as set forth in paragraph eight of the real estate contract.

SUMMARY JUDGMENT: MALPRACTICE CLAIM AGAINST FROERER

We next turn to the Combes' argument that factual issues also barred the summary judgment dismissing the Combes' cross claims against Froerer. The Combes contend that Froerer committed legal malpractice by 1) failing to complete the title work prior to the real estate closing; 2) withholding material information from the Combes; and 3) by simultaneously representing another client with conflicting interests.

[8] Traditionally, in a legal malpractice action, the threshold question is whether an attorney-client relationship was established. Bergman v. New England Ins. Co., 872 F.2d 672, 674 (5th Cir.1989); Guillebeau v. Jenkins, 182 Ga.App. 225, 355 S.E.2d 453, 456 (1987). Once this relationship is proven, the client has the burden of showing two additional elements: 1) negligence on the part of the attorney, and 2) that such negligence was the proximate cause of damage to the client. See, e.g., Dunn v. McKay, Burton, McMurray & Thurman, 584 P.2d 894, 896 (Utah 1978); see also Bergman, 872 F.2d at 674; Guillebeau, 355 S.E.2d at 456.

[9] In general, except where an attorney is appointed by a court, the attorney-client relationship is created by contract. Franko v. Mitchell, 158 Ariz. 391, 762 P.2d 1345, 1351 (Ct.App.1988); Fox v. Pollack, 181 Cal.App.3d 954, 226 Cal.Rptr. 532, 534 (1986). The contract may be express or implied from the conduct of the parties. Margulies by Margulies v. Upchurch, 696 P.2d 1195, 1200 (Utah 1985). The relationship is proved by showing that the party seeks and receives the advice of the lawyer in matters pertinent to the lawyer's profession. People v. Morley, 725 P.2d 510, 517 (Colo.1986) (en banc); Steinbach v. Meyer, 412 N.W.2d 917, 918 (Iowa Ct.App.1987). Such a showing is subjective in that a factor in evaluating the relationship is whether the client thought an attorney-client relationship existed. Matter of Lieber, 442 A.2d 153, 156 (D.C.1982); Matter of Petrie, 154 Ariz. 295, 742 P.2d 796, 801 (1987) (en banc); Louisiana State Bar Ass'n v. Bosworth, 481 So.2d 567, 571 (La.1986). However, a party's belief that an attorney-client relationship exists, unless reasonably induced by representations or conduct of the attorney, is not sufficient to create a confidential attorney-client relationship. Fox, 226 Cal.Rptr. at 535; see also Guillebeau, 355 S.E.2d at 458 ("An *728 attorney-client relationship cannot be created unilaterally in the mind of a would-be client; a reasonable belief is required."). In sum, "[i]t is the intent and conduct of the parties which is critical to the formation of the attorney-client relationship." Hecht v. Superior Court, 192 Cal.App.3d 560, 237 Cal.Rptr. 528, 531 (1987).

The Combes assert that Froerer understood that he had been hired by them to perform several tasks, including 1) the drafting of all documents for the transfer of parcels among the Combe siblings, 2) the drafting of preliminary and final real estate contracts with B-H, 3) conducting a title search, and 4) procuring the title insurance policy. Keith Combe testified in deposition that he always assumed Froerer was his attorney since he was going to be paying him money. Froerer did in fact pay his fees from the funds delivered to him in payment of the purchase price due to the Combes.

Froerer claims, however, that he represented the buyers solely, not the Combes. He counters that merely because he was paid out of the proceeds of the sale does not establish an attorney-client relationship. He argues that such practice is common in real estate transactions and that the argument could be made that the sale proceeds were actually paid by B-H since they were the ones who deposited the money for closing. [FN5]

FN5. Froerer also claims that the Combes' claims against him are barred by the four year statute of limitations under Utah Code Ann. § 78-12-25 (1987). Since this issue was not presented first to the trial court for its consideration and resolution, we will not consider it. See State v. Webb, 790 P.2d 65, 71 (Utah Ct.App.1990). Further, we note that a cause of action for legal malpractice accrues, and the four-year limitation commences to run, when the act complained of is discovered or, in the exercise of reasonable care, should have been discovered. Merkley v. Beaslin, 778 P.2d 16, 19 (Utah Ct.App.1989).

[10] Although payment for legal services may be persuasive evidence that an attorney-client relationship was established. Foulke v. Knuck, 162 Ariz. 517, 784 P.2d 723, 726 (Ct.App.1989), there are exceptions. See, e.g., Guillebeau, 355 S.E.2d at 457 (where party obligated herself to pay closing costs before anyone contacted attorney, she did not pay attorney's fee in the

furtherance of a contract of legal employment and, therefore, no attorney- client relationship existed). However, the payment of attorney fees does not by itself determine whether an attorney-client relationship exists, but is only one indicia. Hecht, 237 Cal.Rptr. at 530; see also Huddleston v. State, 259 Ga. 45, 376 S.E.2d 683, 684 (1989) (although the general test of employment is the fee, the basic question with regard to an attorney-client relationship is whether advice or assistance of the attorney is both sought and received).

[11] In reviewing summary judgment, we must view the evidence in a light most favorable to the Combes, the party opposing summary judgment. Salt Lake City Corp. v. James Constructors, 761 P.2d 42, 45 (Utah Ct.App.1988). Evidence presented to the court on this issue consisted mostly of deposition testimony. Keith Combe testified in deposition that he perceived the transaction of property trades between himself and his siblings as part of the sale to B-H and that he was not aware that Froerer was going to issue title insurance until at the closing when he learned that Froerer would perform the task at the request of Keil. The record further shows that the Combes had no prior contact with Froerer, they at no time sought Froerer's legal advice either before or after the closing, and Froerer was not present at the closing. Also, Keith Combe requested that another attorney, Kunz, review and make necessary changes in the preliminary documents that Froerer drafted. Evidence supporting existence of an attorney-client relationship consists of Keith Combe's testimony that he thought Froerer was acting as his attorney; the type of documents prepared, including the transfers among the Combe siblings; and Froerer's payment from the sale proceeds at closing. Viewing this evidence in a light most favorable to the Combes, we cannot say that there is no genuine issue of material fact entitling Froerer to summary judgment. It is only necessary for the nonmoving party to show *729 "facts" controverting the "facts" asserted by the moving party. Id. We, therefore, reverse and remand on the factual issue of whether an attorney-client relationship existed between Froerer and the Combes. When that fundamental factual issue is determined, the trial court can proceed accordingly with respect to this transaction.

SUMMARY JUDGMENT: CONTRACTUAL & ABSTRACTOR NEGLIGENCE CLAIMS AGAINST FROERER & ATGF

The Combes next argue that schedule A of the title insurance policy insures their interests as well as those of B-H, or was at least ambiguous on this point, rendering the intent of the parties a question of material fact. Schedule A states, in pertinent part:

> 1. The estate or interest in the land described herein and which is covered by this policy is: An interest pursuant to that certain Uniform Real Estate Contract dated January 9, 1980, by and between KEITH P. COMBE and EVELYN, his wife, and FIRST SECURITY BANK N.A., Trustee, as Seller, and CASPER J. BREUER, and WILLIAM M. HARRISON, as Buyer.
> 2. The estate or interest referred to herein is at Date of Policy vested in:
> Parcels # 1 thru # 4: Keith P. Combe and Evelyn Combe
> Parcel # 5: First Security Bank N.A., Trustee, and Keith P. Combe and Evelyn.

The Combes contend that paragraph one refers to the Combes' interest, as well as to B-H's interest, since the Combes retained legal title to the property. If the policy were intended to insure only B-H, argue the Combes, paragraph one should have referred only to the "equitable estate" created by the real estate contract. The Combes also assert that the language in paragraph two, "estate or interest referred to herein" includes the Combes and fails to clearly state that B-H's interest only was insured.

[12][13] "Title insurance is a contract to indemnify the insured against loss through defects in the insured title or against liens or encumbrances that may affect the insured title at the time the policy is issued." Malinak v. Safeco Title Ins. Co. of Idaho, 203 Mont. 69, 661 P.2d 12, 14 (1983). The determination of whether a contract is ambiguous is a question of law. Regional Sales Agency, Inc. v. Reichert, 784 P.2d 1210, 1213 (Utah Ct.App.1989). Thus, as we previously noted, we accord the trial court's interpretation no particular weight, reviewing its interpretation under a correction-of-error standard. The mere fact that the parties disagree as to the meaning of the language contained in the policy is not sufficient to create an ambiguity. B.F. Goodrich Co. v. Vinyltech Corp., 711 F.Supp. 1513, 1517 (D.Ariz.1989). The first step in our review is to examine the document in its entirety and in accordance

with its purpose, giving effect to all of its parts. Larrabee v. Royal Dairy Prods. Co., 614 P.2d 160, 163 (Utah 1980); Regional Sales Agency, Inc., 784 P.2d at 1213.

[14][15] Following careful review of the title insurance policy issued by ATGF, we determine that the Combes' assertions are without merit. The policy clearly insures solely B-H, not the Combes. The title insurance policy is described throughout as the "owners" policy. An executory contract of sale converts the interest of the vendor of the real property to personalty. Willson v. State Tax Comm'n, 28 Utah 2d 197, 499 P.2d 1298, 1300 (1972); Cannefax v. Clement, 786 P.2d 1377, 1379-80 (Utah Ct.App.1990). The vendee acquires the equitable interest in the property at the moment the contract is created and is treated as the owner of the land. Cannefax, 786 P.2d at 1380; Lach v. Deseret Bank, 746 P.2d 802, 805 (Utah Ct.App.1987). Thus, viewing the policy in its entirety, we find the document's purpose clear: to provide title insurance for the owners of the property, Breuer and Harrison. Therefore, the trial court properly granted summary judgment for ATGF and Froerer on the Combes' claim under the title policy.

The Combes also contend that factual issues precluded summary judgment of their claim against Froerer and ATGF for *730 abstractor's negligence. Some jurisdictions have held that a title insurance company has the liability of an abstractor of title when it inspects records and prepares title reports. Culp Construction Co. v. Buildmart Mall, 795 P.2d 650, 653 n. 3 (Utah 1990); Moore v. Title Ins. Co. of Minnesota, 148 Ariz. 408, 714 P.2d 1303, 1306 (Ct.App.1985); see, e.g., White v. Western Title Ins. Co., 40 Cal.3d 870, 221 Cal.Rptr. 509, 710 P.2d 309, 315 (1985); Malinak v. Safeco Title Ins. Co. of Idaho, 203 Mont. 69, 661 P.2d 12, 14-15 (1983); but see Anderson v. Title Ins. Co., 103 Idaho 875, 655 P.2d 82 (1982). However, the Utah Supreme Court recently adopted the "better-reasoned approach" which views preliminary title reports and title insurance commitments as " 'no more than a statement of the terms and conditions upon which the insurer is willing to issue its title policy....' " Culp Constr., 795 P.2d at 653 (quoting Lawrence v. Chicago Title Ins. Co., 192 Cal.App.3d 70, 237 Cal.Rptr. 264, 268 (1987)).

Although the Utah Supreme Court has not directly addressed the issue of tort liability for abstractor negligence, but cf. Culp Constr. at 654-655; Bush v. Coult, 594 P.2d 865, 867 (Utah 1979) (title insurance is in the nature of a warranty), the tort of negligent misrepresentation against third parties to a real estate transaction is clearly recognized by the court. See Christenson v. Commonwealth Land Title Ins. Co., 666 P.2d 302, 305 (Utah 1983). In Christenson, the supreme court defined negligent misrepresentation as follows:

> Where (1) one having a pecuniary interest in a transaction, (2) is in a superior position to know material facts, and (3) carelessly or negligently makes a false representation concerning them, (4) expecting the other party to rely and act thereon, and (5) the other party reasonably does so and (6) suffers loss in that transaction, the representor can be held responsible if the other elements of fraud are also present.

Id. [FN6] (quoting Jardine v. Brunswick Corp., 18 Utah 2d 378, 423 P.2d 659, 662 (1967)).

> FN6. The Utah Supreme Court in Christenson determined that a title insurance company's acknowledgment of a document that incorrectly indicated that certain properties held in escrow had unencumbered equity values available as security for plaintiff amounted to negligent misrepresentation. This case is distinguishable from Christenson. ATGF does not purport to act as anything other than a title insurance company, whereas the title insurance company in Christenson had assumed additional duties as an escrow agent.

[16] In Culp Construction, the supreme court held that a title insurance policy does not constitute a representation of title, but only acts to insure the described title. Since in this case no preliminary report was requested or issued and the title policy was not issued until after closing, the Combes did not rely upon ATGF's alleged representations. The Combes counter that Froerer's actions led the Combes to believe that he had already conducted the title search and issued the title policy, and that they had clear, marketable title to the property. This representation, however, is unsupported by the record. Following careful review, we find that since the Combes did not know or even anticipate that Froerer and ATGF were going to issue title insurance until the time of closing, they did not rely on any representation by Froerer or ATGF that a

preliminary report had been issued.

BIFURCATION OF TRIAL

[17] The Combes next contend that because the bifurcation of the trial was prejudicial to them, it was an abuse of discretion. "Severance is within the sound discretion of the trial court and, absent abuse of such discretion, will not be upset on appeal." King v. Barron, 770 P.2d 975, 976 (Utah 1988); see also Utah R.Civ.P. 21, 42(b). The parties stipulated to the amount paid by B-H and the trial court received the stipulation as binding upon the parties. Consequently, there was only one issue left to be tried: the amount of restitution to be paid as determined from the fair market value of the property. Since the Combes' claims against Froerer and ATGF were irrelevant to the issue of the fair market rental value of the property, the trial court did not abuse its discretion in bifurcating *731 the claims and cross-claims between the appellees and ordering separate trials.

CALCULATION OF RESTITUTIONARY DAMAGES

We next address the court's verdict on restitutionary damages. The Combes claim the trial court erred in concluding that the fair rental value of the property had no relationship to its fair market value at its highest and best use. The trial court determined that the highest and best use of the property in its then present condition was for agricultural purposes and, therefore, credited the Combes with yearly rent of $1500. Citing Warner v. Rasmussen, 704 P.2d 559, 562 (Utah 1985), the Combes insist that, as a matter of law, fair rental value equals a reasonable return on the market value of the property as established by the contract price, and is calculated as the annual interest due on the unpaid balance of the contract, at the contract rate. According to the Combes' expert witness testimony, such calculation would bring a reasonable rate of return of $49,350 per year.

[18] The supreme court in Warner was addressing the trial court's determination of seller's damages for buyer's breach of an installment contract, as measured, in part, by the fair rental value of the property during the period of occupancy. The goal in Warner in awarding the seller damages for loss of use of the property was to grant a reasonable return on the investment. Id. This case, in contrast to Warner, involves the buyer's election of rescission for seller's breach of a land purchase contract. Rescission is a restitutionary remedy which attempts to restore the parties to the status quo to the extent possible or as demanded by the equities in the case. Dugan v. Jones, 724 P.2d 955, 957 (Utah 1986); see also Potter v. Oster, 426 N.W.2d 148, 151 (Iowa 1988). "In the case of a rescission, the buyers are entitled to be returned to the status quo and to recover the payments made on the contract, less the fair rental value of the premises for the time they had possession thereof." Dugan, 724 P.2d at 957.

[19] We find that the trial court correctly determined that the expected rate of return on an investment was an inapplicable measurement in determining the fair rental value of the property for the time B-H had possession. That methodology would preclude restoring the parties to their positions at the time the contract was executed and would provide the Combes with a windfall. We also find that since the use of the property for residential purposes is prohibited by the pipeline easement problems and it was not so used during the contract term, the trial court reasonably determined that the highest and best use of the property in question in its then present condition was for agricultural purposes. That determination was amply supported by the evidence and testimony of B-H's expert witness.

[20] We also reject the Combes' argument that the award of prejudgment interest is improper because B-H delayed in exercising its rescission rights. See Nielson v. Droubay, 652 P.2d 1293, 1297 (Utah 1982) (a prevailing party who delays proceedings may not be awarded prejudgment interest). As we have previously noted, any delay was not unreasonable.

[21] Finally, we agree with the Combes' assertion that the trial court miscalculated the rate of prejudgment interest at ten per cent, in violation of Utah Code Ann. § 15-1-1 (1986). [FN7] The contract was executed prior to 1981 and therefore, prejudgment interest should accrue at six per cent per annum, not ten per cent. SCM Land Co. v. Watkins & Faber, 732 P.2d 105, 109 *732 (Utah 1986). B-H has provided us with no arguments to the contrary. Therefore, we remand for a determination of the prejudgment interest amount.

FN7. Section 15-1-1 states in pertinent part:

> (1) Except when parties to a lawful contract agree on a specified rate of interest, the legal rate of interest for the loan or forebearance of any money, goods, or chose in action shall be 10% per annum. Nothing in this section may be construed to in any way affect any penalty or interest charge which by law applies to delinquent or other taxes or to any contract or obligations made before May 14, 1981.
>
> The Combes point out that the statutory interest rate in effect at the time the contract was executed was at six percent. Utah Code Ann. § 15-1-1 (1953).

CONCLUSION

In conclusion, we affirm the trial court's granting of summary judgment to B-H on its rescission claim against the Combes. We also affirm the trial court's determination of the fair market rental value of the property and the propriety of awarding prejudgment interest. However, we reverse and remand for recalculation of the prejudgment interest amount at six per cent per annum instead of ten per cent. We also reverse and remand on the issue of whether an attorney-client relationship existed between Froerer and the Combes. If such a relationship is found, the Combes may proceed with their legal malpractice claim. We affirm the trial court's summary judgment for Froerer and ATGF on the contractual and abstractor negligence claims and the court's bifurcation of claims against Froerer and ATGF. [FN8]

> FN8. We have considered appellees' suggestion of mootness and find it without merit.

JACKSON, J., concurs.

ORME, Judge (concurring in the result in part, dissenting in part, and concurring in part):

B-H apparently lacked actual notice at least of the extent of the waterline easement until well after the purchase agreement was entered into. Nonetheless, the easement appeared of record and thus B-H "is properly charged with constructive notice" of the easement. Callister v. Millstream Assocs., Inc., 738 P.2d 662, 663 n. 3 (Utah Ct.App.1987); Utah Code Ann. § 57-3-2(1) (1990).

In Callister, which concerned a similar contractual provision to the effect that title would be conveyed free of all liens and encumbrances, with no provision made to exempt easements of record or particular classes of easements, we held that the buyer's constructive knowledge of the encumbrance was essentially irrelevant since it nonetheless "had a contractual right to conveyance of title free and clear of all liens...." 738 P.2d at 663. Come closing, the seller was unable to clear a 60-unit restrictive covenant although it succeeded in substituting for it a more advantageous 75-unit restriction. Id. at 664. This was not enough "A 75-unit encumbrance failed to meet the requirements of the contract and provided grounds for rescission, just as the 60-unit encumbrance would have done." Id. We accordingly affirmed the judgment granting rescission.

In Callister, we were urged to reverse in view of the doctrine "that if the purchaser has notice of encumbrances upon the property, and the encumbrance is of such a nature that it could not be removed by the vendor ... then the purchaser takes possession subject to the encumbrances." Id. at 664 n. 6. We held that the authorities relied on by the vendor in Callister were distinguishable and did not consider the doctrine further. See id. It is noteworthy, however, that the restrictive covenant in Callister was not actually "of such a nature that it could not be removed by the vendor." On the contrary, it was removed, albeit only on the condition that a different restriction be substituted. But there is nothing to suggest that it could not have been removed altogether, given more successful negotiations with adjacent property owners or others who had to consent to the change.

The Combes raise a similar argument here and it is undisputed--apparently in view of the gross unfeasibility financially and otherwise of rerouting a water district's deeply buried water line and accompanying easement around the subject property--that the easement in question cannot be removed by the Combes. Although somewhat lukewarm to the general notion when I authored Callister, see 738 P.2d at 664 n. 6, I am now persuaded it makes good sense. If a purchaser has knowledge of an encumbrance that cannot be removed, and enters into a contract calling for conveyance free and clear, the entire contract is an exercise in futility unless the operative provision be taken to exclude such an encumbrance. Otherwise, the purchaser *733 has entered into a contract requiring the vendor to do the impossible, which would be nonsensical.

As a matter of vendor-vendee law, the general principle seems to be settled. See 77 Am.Jur.2d Vendor & Purchaser § 120 (1975). However, the rule is otherwise in Utah where a warranty deed has actually been given and the question about an irremediable encumbrance arises in the context of whether the warranty provided in Utah Code Ann. § 57-3-2 (1990) has been breached. See Bergstrom v. Moore, 677 P.2d 1123, 1125 (Utah 1984). For the narrow reason that the contract in this case called for delivery of an unrestricted warranty deed, and it is appropriate to read the statutory warranty into the key contractual provision, [FN1] I concur that the Combes cannot prevail under their irremediable encumbrance argument.

> FN1. Stated another way, the Combes would have breached their agreement to deliver an unrestricted warranty deed upon conveying title subject to the easement and it follows they were in anticipatory breach of the contract's requirement for a warranty deed by reason of the easement's existence.

Nonetheless, I would reverse the summary judgment in favor of B-H. I believe the five-year delay in asserting a rescission right, during which time payments were made and the contract was twice amended, necessarily poses a material question of fact: Even if some time to assess the situation and explore possibilities of mitigation was available to B-H after "discovery" of the easement, was five years more than the "reasonable time" the law would permit in which to do so? On the record before us, I cannot conclude that five years was not an unreasonable delay.

I concur in the court's disposition of who is insured under the title policy, but base my conclusion not so much on the characterization of the term "owner" as on the fact that the purchase agreement anticipated the Combes procuring insurance for B-H and the further fact that when both vendor and purchaser under a real estate contract are intended to be insured under a "title" policy, both are clearly identified as insureds, typically with the phrase "as their interests may appear."

I concur in the court's opinion insofar as it treats the "abstractor's negligence" claims, the attorney malpractice claim, the bifurcation issue, and the interest issue.

Finally, even assuming the judgment of rescission should otherwise be affirmed, I disagree with the court's view of how to calculate the offset against payments made for B-H's possession of the property for the years between execution of the contract and assertion of a right to rescind, which in my mind leaves B-H with a substantial windfall. I agree with Professor Dobbs, who suggests that in the usual real estate restitution case the buyer's claim to interest on the payments it gets back, and the seller's claim to the fair rental value of the property while it was detained, should be considered a "wash." See D. Dobbs, Remedies § 12.9 at 846 (1973). This approach would work a much fairer result in this case than valuing B-H's use of the property at agricultural rental rates, not only because the parties' contract fixes a reliable measure of its total value (and thus of an imputed rental value) at a much higher rate, but also because B-H kept the property tied up for so many years during which the Combes were precluded from marketing the property to other buyers. The restitution decreed in this case does not merely make B-H whole; it gives it a hefty profit.

END OF DOCUMENT

(Cite as: 769 P.2d 273)

Kathleen HAMBY, and the State of Utah, by and through the Utah State Department of Social Services, Plaintiffs and Appellants,

v.

Gail JACOBSON, Defendant and Respondent.

880026-CA.

Court of Appeals of Utah.

Jan. 24, 1989.

Action was brought for divorce. The Fourth District Court, Utah County, Ray M. Harding, J., entered judgment, and wife appealed. The Court of Appeals, Greenwood, J., held that finding that two of wife's three children bear surname of father rather than her surname was not supported by evidence.

Reversed and remanded.

***274** Priscilla Ruth MacDougall (argued), Kathleen Hamby, Madison, Wis., Mary C. Corporon, Kellie F. Williams, Corporon and Williams, Salt Lake City, for plaintiffs and appellants.

Lynn D. Wardle (argued), Orem, Richard M. Taylor, Spanish Fork, for defendant and respondent.

Before DAVIDSON, BENCH and GREENWOOD, JJ.

OPINION

GREENWOOD, Judge:

Kathleen Hamby (Hamby) appeals from the trial court's order that two of her children bear the surname of their father, from whom Hamby is divorced, rather than her surname. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Kathleen Hamby and Gail Jacobson are the natural parents of two children, both born out of wedlock. Their first child, named Kelly Lynn Hamby on his birth certificate, was born in June 1983. In November 1983, Hamby married Gail Jacobson (Jacobson) and assumed Jacobson as her surname. After the parties married, they agreed to change Kelly's surname to Jacobson. Although Hamby signed forms changing Kelly's name, the papers were never filed with the State of Utah. Hamby also had a son from a previous marriage who bore the surname Hamby, the surname of Hamby's prior husband.

During their marriage, Hamby became pregnant with the parties' second child. Shortly thereafter, Hamby filed for divorce from Jacobson. The parties executed a stipulation which provided, among other things, that Hamby be awarded custody of the parties' two children and that she resume her pre- marriage name of Hamby. The only issue remaining was whether Kelly and the unborn child should use Jacobson or Hamby as their surname.

On March 14, 1985, Judge J. Robert Bullock held a trial regarding the children's surnames. Jacobson was unable to attend the hearing because of his job. Hamby appeared and testified that Jacobson was verbally and physically abusive to Kelly during the marriage, drunk more often than sober and unwilling to work. Hamby also stated that Jacobson had a reputation in their small town as a fighter and a drinker. In addition, Hamby testified that Jacobson had hit Kelly with a board, causing loss of upward motion in his left eye and that no treatment was available for Kelly's eye.

Hamby further testified that Jacobson had not seen Kelly since the parties had separated in October 1984.

When asked why the children should bear the surname Hamby, Hamby testified that if all family members had the same last name, the family members would be closer and more secure. Hamby also said she was raised in a home where the family members had different last names and the name differences adversely affected family security. A school psychologist, Mr. Downey, testified that generally, different surnames in a family disrupt the children's identity with themselves and their family, divide family unity, adversely affect security and could hinder development. However, *275 Mr. Downey also testified that some children in families with multiple surnames are not adversely affected, and the surname issue should be examined on a case-by-case basis.

The court granted the parties' divorce on April 11, 1985, restored Kathleen Jacobson to her former name of Hamby, permitted Kelly to retain Hamby as his surname, and ordered that the unborn child bear the surname Jacobson. The court stated that either party could file a petition to change Kelly's or the unborn child's name within thirty days of the expected child's birth. The younger child, Kevin, was born on April 13, 1985, two days after the divorce was granted.

After Kevin's birth, Hamby filed a petition to change his surname to Hamby. She relied on her testimony before Judge Bullock to support her claim that Kevin should use the Hamby surname. Jacobson filed a reply and petition, claiming that both Kelly and Kevin should bear his surname because he was their father. On October 24, 1985, Judge Ray Harding, newly assigned to the case, held an informal conference in chambers. Judge Harding stated that the best way to proceed with the case would be by proffers of evidence and that the principal issue was a matter of law. Hamby's attorney proffered that Hamby would testify as follows: that she and her eleven-year-old son used the name Hamby, her name from a prior marriage; that her two-year-old son, Kelly, was named Hamby on his birth certificate and continued to use Hamby; that although Hamby and Jacobson discussed changing Kelly's name to Jacobson, the change was never made; and that she followed the court's prior order that Kevin be given the surname Jacobson. Further, Hamby's attorney proffered that Hamby believed all her children should have the same last name and that it would be in Kelly and Kevin's best interests to bear the name Hamby. Hamby also proffered that Jacobson was unfit and bearing his name might create problems for Kelly and Kevin. Jacobson's attorney proffered that Jacobson would testify that he was not a saint, but his behavior was not so terrible as to require taking his name from the children and further, that Hamby's character and behavior were also negative.

After taking the parties' proffers, the court directed both parties to file memoranda. Attached to Hamby's memorandum was a letter from Richard Parks, the Educational Coordinator of The Spafford School, stating that it is important to all children that they know they are part of a family in all possible ways, both actual and symbolic.

Subsequently, the court ruled that "it is in the best interest of the parties minor children, Kelly Lynn and Kevin D., to be known by the surname Jacobson." The ruling stated as follows. The court bases this ruling on the following reasons: 1) the father-child relationship will be strengthened by the children bearing the name Jacobson while not harming the mother-child relationship, 2) there is no embarrassment or inconvenience associated with an explanation of why their mother's surname is different since divorce is a common occurrence, 3) the children are too young to be accustomed to the surname Hamby, 4) Hamby is not the mother's maiden name, 5) there is no embarrassment because of defendant's alleged bad reputation, and 6) the children will always be identified with at least one natural parent by being known as Jacobson. The court finds unpersuasive plaintiff's

arguments that it would be beneficial for Kevin and Kelly to be known by Hamby as their mother and step [brother]. Were custody to change, Kevin and Kelly would be faced with the same situation plaintiff now seeks to avoid. Furthermore, were plaintiff to remarry[,] Kevin and Kelly would again have a surname other than of at least one of their custodial parents. Of paramount concern to the court is the fact that Kevin and Kelly should both bear the same name to avoid any implications of illegitimacy which might arise if asked why ***276** brothers of the same natural father have different last names. Finally, the court notes that the law provides that the children may petition for a name change if they so desire when they are old enough to make an intelligent decision.

On appeal, Hamby claims that (1) the court erred in utilizing the standard of the children's best interests; and (2) even if that standard is legally correct, the evidence does not support the court's conclusion that use of the surname Jacobson is in the best interests of the children.

APPROPRIATE TEST FOR CHILD'S NAME CHANGE

Traditionally, legitimate children in the United States have borne their father's surname. In re Schiffman, 28 Cal.3d 640, 169 Cal.Rptr. 918, 920- 21, 620 P.2d 579, 581-82 (1980); Note, The Controversy over Children's Surnames: Familial Autonomy, Equal Protection and the Child's Best Interests, 1979 Utah L.Rev. 303, 306 (hereinafter Utah Note). However, this tradition has been eroded in more recent times, as parents have chosen other methods of naming their children, both legitimate and illegitimate. Simultaneously, women have, with increasing frequency, opted to retain their birth names after marriage, or select a surname other than their husband's. Utah Note, 1979 Utah L.Rev. at 306. Most states, including Utah, have no statutes which dictate a child's surname, and parents may, therefore, select any one of several possible surnames, including the maternal surname, the paternal surname, a combination of the maternal and paternal surnames or a surname unrelated to either parent. [FN1] Id.

FN1. The Utah Department of Health, however, has promulgated rules in connection with the issuance of birth certificates and vital statistics, which recognize the parents' right to choose a child's surname and state that if the mother is married, the child usually receives, but is not required to receive, the paternal surname. "Guidelines for Reporting Name of Father and Surname of Child on the Birth Certificate" (revised October 5, 1981); Utah Code Ann. s 26-1-5 (1984). According to the rule, when parents disagree, the sole consideration should be the best interests of the child. However, when a child's mother is not married, she has considerable latitude in determining her child's surname. Even if she names the father on the birth certificate, she can give the child a surname different from the father's. The Utah Department of Health amended the rule in 1988 to provide that "[i]f the parents disagree on the child's name and they have never married each other or are separated or divorced, the custodial parent shall determine the child's name." Thus, the rule mandates consideration of the child's best interests when the parents are married, but allows a custodial preference in instances of no marriage, separation or divorce.

In the trial court proceedings, Jacobson argued that there should be a presumption that the paternal surname be used. Indeed, some courts in the past followed the view that a father has a protectible or primary interest in having his children bear his surname, unless he has forfeited that right by misconduct or neglect. In re Spatz, 199 Neb. 332, 258 N.W.2d 814, 815 (1977); In re Harris, 160 W.Va. 422, 236 S.E.2d 426, 428-29 (1977). The Harris court relied on the "long-standing social convention" that the child bears the father's surname. Harris, 236 S.E.2d at 429. That social convention evolved from the common law view that a married woman had "little

legal identity apart from her husband's." Schiffman, 169 Cal.Rptr. at 920, 620 P.2d at 581. However, our society no longer adheres to the notion that the husband is the sole legal representative of the family, its property and children, and therefore able to unilaterally determine the surname of the couple's children. Id. On appeal, however, Jacobson now urges that the trial court applied the appropriate test of the children's best interests.

Hamby, on the other hand, argues that Utah should adopt a rebuttable presumption that the custodial parent's choice of a surname governs. That position was propounded by Justice Mosk of the California Supreme Court in a concurring opinion in Schiffman. Mosk reasoned that the custodial parent normally makes decisions regarding such matters as children's health, education and religious upbringing, and that choice of a surname should be similarly handled. Id. 169 Cal.Rptr. at 923-24, *277 620 P.2d at 584-85. However, most recent court decisions have both rejected the notion that there is a preference for the paternal name and failed to adopt a preference for custodial parent choice, preferring to follow the rule that a name change request should be granted only if the court finds the name change is in the best interests of the child. Laks v. Laks, 25 Ariz.App. 58, 540 P.2d 1277, 1280 (1975); Schiffman, 169 Cal.Rptr. at 922, 620 P.2d at 583; Hamman v. County Court, 753 P.2d 743, 749 (Colo.1988); Sullivan v. McGaw, 134 Ill.App.3d 455, 89 Ill.Dec. 540, 547, 480 N.E.2d 1283, 1291 (1985); Aitken County Family Serv. Agency v. Girard, 390 N.W.2d 906, 908-09 (Minn.App.1986); Bobo v. Jewell, 38 Ohio St.3d 330, 528 N.E.2d 180, 184 (1988); Daves v. Nastos, 105 Wash.2d 24, 711 P.2d 314, 318 (1985). The issue has not been specifically decided by the Utah appellate courts.

In Schiffman, the court addressed the issue by first noting that the long-standing rule in custody disputes that the mother is the preferred custodian of young children had been abolished in order to equalize the rights of parents. Similarly, laws had been promulgated to eliminate legal distinctions between legitimate and illegitimate children. Laws eliminating such distinctions mean that "[t]he Legislature clearly has articulated the policy that irrational, sex-based differences in marital and parental rights should end and that parental disputes about children should be resolved in accordance with each child's best interest." Schiffman, 169 Cal.Rptr. at 921, 620 P.2d at 582. In Pusey v. Pusey, 728 P.2d 117 (Utah 1986), the Utah Supreme Court similarly rejected the maternalistic or tender years presumption in child custody cases. The Court noted that the maternal preference violates article IV, section 1 of the Utah Constitution's gender bias prohibition, and also "perpetuates outdated stereotypes." Id. at 120. Because the maternal presumption is not based on present day reality, the Court found it fails to truly evaluate the child's best interests. Accordingly, the Court held that instead of arbitrarily applying a maternal presumption, child custody should be determined with resort to factors focusing on the best interests of the child. Id.

[1] We find that under the rationale of Pusey, a paternal preference for a child's surname is improper, just as would be a preference for the maternal surname. However, we are unwilling to adopt a presumption in favor of the choice of the custodial parent, finding that the best interests of the child test can appropriately include consideration of the custodial situation of the child, as well as other relevant factors. See Schiffman, 169 Cal.Rptr. at 922, 620 P.2d at 583. We, therefore, hold that the best interests of the child is the paramount consideration in determining whether a child's name should be changed. Id. 169 Cal.Rptr. at 920, 620 P.2d at 581; Sullivan, 89 Ill.Dec. at 547, 480 N.E.2d at 1291; Bobo, 528 N.E.2d at 184-85.

APPLICATION OF BEST INTERESTS TEST

[2] In determining a child's best interests, courts have considered factors including: 1) the child's preference in light of the child's age and experience, Daves, 711 P.2d at 318; 2) the effect of

a name change on the development and preservation of the child's relationship with each parent, Id.; 3) the length of time a child has used a name, Daves, 711 P.2d at 318; Nellis v. Pressman, 282 A.2d 539 (D.C.1971), cert. denied, 405 U.S. 975, 92 S.Ct. 1196, 31 L.Ed.2d 249 (1972); 4) the difficulties, harrassment or embarrassment a child may experience from bearing the present or proposed name, Schiffman, 169 Cal.Rptr. at 922, 620 P.2d at 583; In re Saxton, 309 N.W.2d 298, 301 (Minn.1981), cert. denied, 455 U.S. 1034, 102 S.Ct. 1737, 72 L.Ed.2d 152 (1982); 5) the possibility that a different name may cause insecurity and lack of identity, In re Spatz, 258 N.W.2d at 815; and 6) the motive or interests of the custodial parent, In re Omelson, 112 Ill.App.3d 725, 68 Ill.Dec. 307, 311, 445 N.E.2d 951, 955 (1983). We believe that these factors and perhaps others may be relevant, but that courts should apply only those factors present in the particular circumstances of each case. Bobo, 528 N.E.2d at 185. Further, because the ***278** child's best interests is dependent upon the particular facts in a case, the court should enter findings of fact which state the reasons for granting or denying the application to change the child's name. See Daves, 711 P.2d at 318.

We also point out that lip-service to the best interests of the child should not be used as a subterfuge to nevertheless perpetuate the paternal preference. See Utah Note, 1979 Utah L.Rev. at 327. That possibility was particularized in Bobo v. Jewell, 528 N.E.2d at 184-85, as follows: We caution the courts, however, to refrain from defining the best-interest- of-the-child test as purporting to give primary or greater weight to the father's interest in having the child bear the paternal surname. While it may be a custom to name a child after the father, giving greater weight to the father's interest fails to consider that, where the parents have never been married, the mother has at least an equal interest in having the child bear the maternal surname. In these times of parental equality, arguing that the child of unmarried parents should bear the paternal surname based on custom is another way of arguing that it is permissible to discriminate because the discrimination has endured for many years. [FN2]

FN2. While this quotation refers to unmarried parents, we think it applies equally to children born to a married couple. We would hope, however naively, that disputes about children's names between spouses in an ongoing marriage would be handled outside of the courtroom.

[3] In addition, we observe that ascertaining the best interests of a child is a factual, not a legal, determination. This notion has been intimated in Utah decisions involving the best interests of a child in custody and visitation disputes. For example, in Smith v. Smith, 726 P.2d 423, 425 (Utah 1986), the Court stated: Because the proper adjudication of custody matters "is highly dependent upon personal equations which the trial court is in an advantaged position to appraise," this Court will not overturn a trial court's custody determination on appeal unless the evidence clearly shows that the custody determination was not in the best interests of the child or that the trial court misapplied applicable principles of law. Similarly, in Alexander v. Alexander, 737 P.2d 221, 223 (Utah 1987), the Court noted that "the task of determining the best interests of the child in a custody dispute is for the trial judge, who has the opportunity to personally observe and evaluate the witnesses." See Ebbert v. Ebbert, 744 P.2d 1019 (Utah Ct.App.1987) (visitation dispute). Determination of the child's best interests is the ultimate factual conclusion in a custody case or one involving a child's surname. Traditional appellate principles afford the trial judge great deference in making factual determinations, based in large part on his/her opportunity to observe witnesses. Utah R.Civ.P. 52(a).

In this case, unfortunately, there was scant live testimony, and most of it occurred before

Judge Bullock, who did not ultimately decide the issue. Both parties stipulated to proffers of testimony in front of Judge Harding, who encouraged the stipulation by his remark that the principal issue was a question of law, not fact. This was error, as the only legal issue before the court was the appropriate test to apply in the matter. The court correctly determined that the test was the best interests of the children, but incorrectly implied that application of the test to the facts was an exercise designed to arrive at a legal conclusion. As stated in Fullmer v. Fullmer, 761 P.2d 942, 945 (Utah Ct.App.1988), when the evidence consists only of proffers to the trial court, the appellate court is "in as good a position to review the proffer as was the trial court, as no assessment of witness credibility occurred below. Therefore, we review the facts and draw our own legal conclusions therefrom." We also note that in cases involving the best interests of a child and competing claims by parents of the child, demeanor and credibility of witnesses is particularly critical, and use of proffers should be discouraged. Id. at 945 n. 1.

*279 FINDING THAT CHILDREN'S BEST INTERESTS REQUIRED PATERNAL SURNAME

Standard of Review

We now examine the trial court's ultimate finding that it was in the children's best interests to bear the surname Jacobson. We review the trial court's findings under a clearly erroneous standard and will not disturb those findings unless they are against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made. State v. Walker, 743 P.2d 191, 193 (Utah 1987).

Sufficiency of Evidence

[4] The court based its best interests finding on several enumerated factors. First, the trial court examined the effect of the name change on the children's relationship with their father and mother. The court found that the children's use of the Jacobson surname would strengthen the father-child relationship and not harm the mother-child relationship. However, the record contains no evidence that use of Jacobson would strengthen the father-child relationship. Further, Mr. Downey's testimony established that use of the Jacobson surname may divide family unity, thus harming the mother-child relationship. Therefore, the evidence indicates that use of Jacobson would adversely affect the mother-child relationship and the court's finding to the contrary is clearly erroneous.

Second, the court found that the children would not suffer embarrassment or inconvenience if their surname were different from their mother's since divorce is a common occurrence. However, there is no support for this proposition in the record. Contrary to the finding, Hamby testified that in her experience, different surnames within a family adversely affect security and family closeness. Mr. Downey stated that different surnames in a family usually disrupt children's identity with themselves and the family, divide family unity, adversely affect security and could hinder development. Mr. Parks's letter, which was attached to Hamby's memorandum, states that it is important for children to know that they are part of a family--both symbolically and actually. Therefore, the clear weight of the evidence is contrary to the court's finding and supports a finding that the children would suffer embarrassment, insecurity, identity problems and have less family unity if they used surnames different from other family members.

Third, the court found that the children were too young to be accustomed to the surname Hamby. Although no evidence was submitted regarding whether changing the children's names at their young age would have any effect upon them, it is fairly obvious that the children would not be especially accustomed to their surnames. In any event, in this case the length of time the children

have used their surnames appears to be of little assistance in determining the children's best interests.

The court's fourth reason for ordering the children to bear the name Jacobson was because Hamby is not the mother's maiden name. Although the court correctly stated that Hamby is not the mother's maiden name, the court did not intimate why that fact was relevant to the children's best interests. Therefore, the finding does not support the ultimate conclusion.

The court also found that the children would not be embarrassed to bear the Jacobson surname due to Jacobson's alleged bad reputation. That finding is not only unsupported by the evidence but also against the clear weight of the evidence. Hamby testified that Jacobson has a reputation as a drinker and a fighter, was verbally and physically abusive towards Kelly, and drunk more often than sober. Hamby also testified that Jacobson hit Kelly with a board causing Kelly to lose upward motion in his eye. Jacobson's proffered testimony was that he was not a saint, but his behavior was not so terrible as to justify taking his name from the children. Accordingly, the clear weight of the evidence supports the opposite finding, namely that Jacobson had a reputation that may embarrass children bearing his surname.

***280** The court's sixth finding was that the children, by bearing the name Jacobson, would always be identified with at least one natural parent. The uncontroverted evidence indicated that Hamby did not intend to change her surname even if she remarried. Therefore, although it is logical that the children's use of Jacobson would always identify them with one natural parent, it is also true that use of Hamby as their surname would yield the same result.

The court also found that the children would not benefit from having the same last name as their mother and stepbrother. However, Hamby, Mr. Downey and Mr. Parks testified to the contrary that the children would benefit from having the same surname as the rest of the family, and there was no evidence to the opposite effect. Therefore, that finding is clearly erroneous.

The court also stated that "were plaintiff to remarry Kevin and Kelly would again have a surname other than at least one of their custodial parents." However, because the unrefuted evidence established that Hamby would not change her name upon remarriage, by bearing the Hamby surname, the children would always bear the same name as one custodial parent. On the contrary, if the children bore the name Jacobson, they would have a name different from either custodial parent and their stepbrother.

Finally, the court found that Kelly and Kevin should have the same surname to avoid implications of illegitimacy since they have the same father. Again, there is no evidence to support that finding, and it is equally true that if all family members bear the Hamby surname, implications of illegitimacy would be unlikely.

Conclusion

Based on our analysis of the evidence, we find that there was insufficient evidence, as a matter of law, to support the court's order that the children bear the surname Jacobson, and that the clear weight of the evidence established that it is in the best interests of Kelly and Kevin that they bear the surname Hamby.

Reversed and remanded for entry of an order in accordance with this opinion.

BENCH and DAVIDSON, JJ., concur.

ADDENDUM C

SELECT COLORADO STATUTES

WEST'S COLORADO REVISED STATUTES ANNOTATED
WEST'S COLORADO COURT RULES ANNOTATED
COLORADO RULES OF CIVIL PROCEDURE
CHAPTER 1. SCOPE OF RULES, ONE FORM OF ACTION, COMMENCEMENT OF ACTION, SERVICE OF PROCESS, PLEADINGS, MOTIONS AND ORDERS

Current with amendments received through July 1, 1996

RULE 4. PROCESS

(a) To What Applicable. This Rule applies to all process except as otherwise provided by these rules.

(b) Issuance of Summons by Attorney or Clerk. The summons may be signed and issued by the clerk, under the seal of the court, or it may be signed and issued by the attorney for the plaintiff. Separate additional or amended summons may issue against any defendant at any time. All other process shall be issued by the clerk, except as otherwise provided in these rules.

(c) Contents of Summons. The summons shall contain the name of the court, the county in which the action is brought, the names or designation of the parties, shall be directed to the defendant, shall state the time within which the defendant is required to appear and defend against the claims of the complaint, and shall notify him that in case of his failure to do so, judgment by default may be rendered against him. If the summons is served by publication, the summons shall briefly state the sum of money or other relief demanded. The summons shall in the signature element thereof, contain the name, address, and registration number of the plaintiff's attorney, if any, and if not, the address of the plaintiff. Except in case of service by publication under Rule 4(h) or when otherwise ordered by the court, the complaint shall be served with the summons, and in all other cases service of a summons alone after the effective date of this amended rule shall not constitute service of process. In any case, where by special order personal service of summons is allowed without the complaint, a copy of the order shall be served with the summons.

(d) By Whom Served. Process may be served:

(1) Within the state, by the sheriff of the county where the service is made, or by his deputy, or by any other person over the age of eighteen years, not a party to the action;

(2) At any other place by a sheriff, deputy sheriff, constable, deputy constable, bailiff, deputy bailiff, or other officer having like powers and duties of the political subdivision in which the service is made or an officer authorized by the laws of this state to take acknowledgements in such political subdivision to deeds conveying real estate situate in this state or an attorney, counselor at law, solicitor, advocate, barrister duly qualified to practice law in such political subdivision or a person specially commissioned to serve process by the court in which the action is pending.

(e) Personal Service in State. Personal service within the state shall be as follows:

(1) Upon a natural person over the age of eighteen years by delivering a copy or copies thereof to him personally, or by leaving a copy or copies thereof at his dwelling house or usual place of abode, with some member of his family over the age of eighteen years, or at his usual place of business, with his stenographer, bookkeeper, or chief clerk; or by delivering a copy to an agent authorized by appointment or by law to receive service of process;

(2) Upon a natural person, between the ages of thirteen years and eighteen years, by delivering a copy thereof to such person and another copy thereof to his father, mother, or guardian, or if there be none in the state, then by delivering a copy thereof to any person in whose care or control he may be; or with whom he resides, or in whose service he is employed; and upon a natural person under the age of thirteen years by delivering a copy to his father, mother, or guardian;

(3) Upon a person for whom a conservator has been appointed, by delivering a copy thereof to such conservator,

(4) Upon a partnership, or other unincorporated association, by delivering a copy thereof to one or more of the partners or associates, or a managing or general agent thereof;

(5) Upon a private corporation, by delivering a copy thereof to any officer, manager, general agent, or registered agent. If no such officer or agent can be found in the county in which the action is brought, such copy may be delivered to any stockholder, agent, member, or principal employee found in such county. If such service is upon a person other than an executive officer, the secretary, general agent, or registered agent, then the clerk shall mail a copy thereof to the corporation at its last known address, at least twenty days before default is entered;

(6) Upon a municipal corporation, by delivering a copy thereof to the mayor or clerk or deputy clerk of such corporation;

(7) Upon a county, by delivering a copy thereof to the county clerk or his chief deputy;

(8) Upon a school district, by delivering a copy thereof to the clerk or one of the directors of such school district,

(9) Upon the state by delivering a copy thereof to the attorney general, or to any employee in his office designated by him to accept service of process;

(10)(A) Upon an officer, agent, or employee of the state, acting in his official capacity, by delivering a copy thereof to the officer, agent, or employee, and by delivering a copy to the attorney general, or to any employee in his office designated by him to accept service of process.

(B) Upon a department or agency of the state, subject to suit, by delivering a copy thereof to the principal officer, chief clerk, or other executive employee thereof, and by delivering a copy to the attorney general, or any employee in his office designated by him to accept service of process.

(C) For all purposes the date of service upon the officer, agent, employee, department, or agency shall control, except that failure to serve copies upon the attorney general within three days of service upon the officer, agent, employee, department, or agency shall extend the time within which the officer, agent, employee, department, or agency must file a responsive pleading for sixty days beyond the time otherwise provided by these Rules.

(f) Personal Service Outside the State. Personal service outside the state may be made:

(1) In any action, upon a natural person over the age of eighteen years who is a resident of this state, or who is a nonresident of this state and who has submitted to or has become subject by law to the jurisdiction of the courts of

TEXT
registered agent, or when the registered agent appointed cannot be found at the registered office;
(D) Nonresidents of the state; persons who have departed from the state without intention of returning; persons who conceal themselves to avoid service of process; or persons whose whereabouts are unknown and who cannot be served by personal service in the state.
(h) Publication. The party desiring service of process by publication shall file a motion verified by the oath of such party or of someone in his behalf for an order of publication. It shall state the facts authorizing such service, and shall show the efforts, if any, that have been made to obtain personal service within this state and shall give the address, or last known address, of each person to be served or shall state that his address and last known address are unknown. The court shall hear the motion ex parte and, if satisfied that due diligence has been used to obtain personal service within this state or that efforts to obtain the same would have been to no avail, shall order publication of the process in a newspaper published in the county in which the action is pending. Such publication shall be made for four weeks. Within fifteen days after the order the clerk shall mail a copy of the process to each person whose address or last known address has been stated in the motion. Service shall be complete on the day of the last publication. If

WEST'S COLORADO REVISED STATUTES ANNOTATED
WEST'S COLORADO COURT RULES ANNOTATED
COLORADO RULES OF CIVIL PROCEDURE
CHAPTER 25. RULES OF COUNTY COURT CIVIL PROCEDURE

Current with amendments received through July 1, 1996

RULE 304. SERVICE OF PROCESS

(a) To What Applicable. Except as otherwise provided by these rules, all process shall be served in the same manner as service of a summons and complaint.

(b) Initial Process. Except in cases of service by publication under Rule 304(E), the complaint and a blank copy of the answer form shall be served with the summons, and in all other cases service of a summons alone after the effective date of this amended rule shall not constitute service of process.

(c) By Whom Served. The summons and complaint may be served inside or outside this state, by the sheriff of the county where the service is made, or by the sheriff's deputy, or by any other person over the age of eighteen years, not a party to the action.

(d) Personal Service. Personal service of the summons and complaint shall be as follows:

(1) Upon a natural person over the age of eighteen years, by delivering a copy thereof to the person, or leaving a copy at the person's usual place of abode, with any person over the age of eighteen years who is a member of the person's family , or at the person's usual place of business, with the person's secretary, bookkeeper, or chief clerk; or by delivering a copy to an agent authorized by appointment or by law to receive service of process.

(2) Upon a natural person under the age of eighteen years, by delivering a copy thereof to the person and a copy thereof to the person's father, mother, or guardian, or if there be none in the state, then by delivering a copy thereof to any person in whose care or control the person may be, or with whom the person resides, or in whose service the person is employed

(3) Upon a person for whom a conservator has been appointed, by delivering a copy thereof to such conservator.

(4) Upon a partnership, or other unincorporated association, by delivering a copy thereof to one or more of the partners or associates, or a managing or general agent thereof.

(5) Upon a private corporation, by delivering a copy thereof to any officer, manager, general agent, or agent for process. If no such office or agent can be found in the county in which the action is brought, such copy may be delivered to any stockholder, agent, member or principal employee found in such county. If such service be upon a person other than an executive officer, the secretary, general agent, or agent for process, then the clerk shall mail a copy thereof to the corporation at its last known address, at least fifteen days before default is entered.

(6) Upon a municipal corporation, by delivering a copy thereof to the mayor or clerk of such corporation.

(7) Upon a county, by delivering a copy thereof to the county clerk and recorder or chief deputy.

(8) Upon a school district, by delivering a copy thereof to the clerk or one of the directors of such school district.

(9) Upon a department or agency of the state, subject to suit, by delivering a copy thereof to the principal officer, chief clerk, or other executive employee thereof.

(e) Other Service. Service by mail or publication shall be allowed only in actions affecting specific property or status or other proceedings in rem. When service is by publication, the complaint need not be published with the summons. The party desiring service of process by mail or publication shall file a motion verified by the oath of such party or of someone in the party's behalf for an order of service by mail or publication. It shall state the facts authorizing such service, and shall show the efforts, if any, that have been made to obtain personal service and shall give the address, or last known address, of each person to be served or shall state that this address and last known address are unknown. The court shall hear the motion ex parte and, if satisfied that due diligence has been used to obtain personal service or that efforts to obtain the same would have been to no avail, shall:

(1) Order the clerk to send by registered or certified mail a copy of the summons and a copy of the complaint, addressed to such person at such address, requesting a return receipt signed by addressee only. Such service shall be complete on the date of the filing of the clerk's proof thereof, together with such return receipt attached thereto signed by such addressee, or

(2) Order publication of the summons in a newspaper published in the county in which the action is pending. Such publication shall be made for four weeks. Within fifteen days after the order the clerk shall mail a copy of the summons and complaint to each person whose address or last known address has been stated in the motion. Service shall be completed on the day of the last publication. If no newspaper be published in the county, the court shall designate one in some adjoining county.

(3), (4) Deleted effective January 1, 1994.

(f) Manner of Proof.

(1) If served in a state or territory of the United States by a sheriff or United States marshal, or a deputy, by such persons's certificate with a statement as to date, place and manner of service.

(2) If by any other person, by the person's affidavit thereof, with the same statement.

(I) to (IV) Deleted effective January 1, 1994.

(3) If by mail, by the certificate of the clerk showing the date of the mailing, and the date the clerk received the return receipt.

(4) If by publication, by the affidavit of publication, together with the certificate of the clerk as to the mailing of copy of the summons where required.

(5) By the written admission or waiver of service by the person to be served, duly acknowledged.

(g) Amendment. At any time in its discretion and upon such terms as it deems just, the court may allow any summons or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the summons issued.

(h) Refusal of Copy. If a person to be served refuses to accept a copy of the summons and complaint, service shall be sufficient if the person serving the documents knows or has reason to identify the person who refuses to be served, identifies the documents being served as a summons and complaint, and offers to deliver a copy of the documents to the person who refuses to be served.

(i), (j) Deleted effective January 1, 1994

CREDIT(S)

1996 Electronic Pocket Part Update

Amended effective January 1, 1994

<General Materials (GM) - References, Annotations or Tables>

CROSS REFERENCES

1990 Main Volume

Power to issue process, see § 13-6-307

Related rules of practice,
Civil practice generally, see Civil Procedure Rule 4
Small claims courts, see Civil Procedure Rule 504

Service of process upon persons subject to state court jurisdiction, see § 13- 1-125

LIBRARY REFERENCES

1990 Main Volume

Corporations 507(1) to (15), 668(1) to (16)
Process 8 to 150, 154, 162 to 165
WESTLAW Topics Nos 101, 313
C J S Corporations §§ 1306 to 1322, 1937 to 1949
C J S Process §§ 2 to 92, 101 to 105
Colorado Civil Trial Practice, Vol 6 (1986) DeMuro §§ 104, 110, 112, 113, 116, 117
Colorado Methods of Practice, Rev.3d Ed , Vol 1A (1989). Krendl, §§ 752, 812, 848

Rules Civ Proc , County Court Rule 304

CO ST CTY CT RCP Rule 304

END OF DOCUMENT

WEST'S COLORADO REVISED STATUTES ANNOTATED
TITLE 19. CHILDREN'S CODE
APPENDIX
CHAPTER 28. COLORADO RULES OF JUVENILE PROCEDURE
PART SIX. ADOPTION AND RELINQUISHMENT

Current with amendments received through July 1, 1996

RULE 6.1. SERVICE BY PUBLICATION

Affidavits in support of motions for service by publication shall be governed by C.R.C.P. 4(h), and shall include a detailed statement of the specific efforts made to locate an absent parent. A single publication is sufficient.

<General Materials (GM) - References, Annotations, or Tables>

LIBRARY REFERENCES

1990 Main Volume

Adoption⚿ 12.
WESTLAW Topic No. 17.
C.J.S. Adoption of Persons §§ 78 to 86.

Juvenile Procedure Rule 6.1

CO ST JUV P Rule 6.1

END OF DOCUMENT

WEST'S COLORADO REVISED STATUTES ANNOTATED
TITLE 19. CHILDREN'S CODE
APPENDIX
CHAPTER 28. COLORADO RULES OF JUVENILE PROCEDURE
PART SIX. ADOPTION AND RELINQUISHMENT

Current with amendments received through July 1, 1996

RULE 6.3. RELINQUISHMENT

(1) Every petition in relinquishment shall contain the following:

(a) All information required by Section 19-5-103, C.R.S.;

(b) A statement as to venue being proper; and

(c) A statement if the relinquishment is part of a designated adoption, with particular details as to the designation and whether any fees or costs are being paid by the prospective adoptive parent(s).

(2) Prior to the hearing on relinquishment, a copy of a report shall be filed with the court by a county department of social services or licensed child placement agency detailing the counseling provided to the petitioner(s).

(3) Any motion for service by publication of an absent parent shall be governed by C.R.C.P. 4(h), and an affidavit must accompany the motion detailing what steps have been taken to determine the whereabouts of the absent parent. A single publication is sufficient.

<General Materials (GM) - References, Annotations, or Tables>

LAW REVIEW AND JOURNAL COMMENTARIES

1990 Main Volume

Representing the Mentally Retarded or Disabled Parent. 11 Colo.Law. 693 (March 1982).

LIBRARY REFERENCES

1990 Main Volume

Infants⚿ 19.4.
WESTLAW Topic No. 211.
C.J.S. Adoption of Persons §§ 10 to 12.

NOTES OF DECISIONS

1. Service of papers

"Paper," within purview of rule requiring party who

files "paper" to serve copy of such "paper" on adverse party not later than 48 hours after filing, was not limited to discovery papers and it encompassed types of paper listed as well as similar paper; therefore, be served. People in Interest of M.M., 1986, 726P.2d 1108.

service requirements of rule applied to motion for termination of parental rights, in view of fact that Juvenile Procedure Rule was silent as to time period within which motion to terminate parental rights should

2. Burden of proof

Burden of proof in proceeding to terminate parental rights is by preponderance of evidence, not by clear and convincing proof. People in Interest of B. J. D., App.1981, 626 P.2d 727.

3. Findings

Evidence supported trial court's findings of mistake and excusable neglect on the part of the parents, who had filed a petition to relinquish all their rights and obligations with respect to their child, and the findings that the parents were developmentally disabled, mentally retarded, and did not understand the finality of relinquishment. Petition of J. B. P., App.1980, 608 P.2d 847, 44 Colo.App. 95.

4. Rehearing

Colorado rule of juvenile procedure, requiring that a motion for new trial or rehearing be made within ten days of entry of the order or decree, was inapplicable where the court did not inform the parents, who were not represented by counsel in proceeding on petition to relinquish their parental rights and obligations with respect to their child, that a motion for new trial or rehearing had to be made within ten days; accordingly, the parents' new trial motion was governed by, and timely under, rule of civil procedure allowing such a motion to be filed not later than 15 days after entry of judgment. Petition of J. B. P., App.1980, 608 P.2d 847, 44 Colo.App. 95.

Juvenile Procedure Rule 6.3

CO ST JUV P Rule 6.3

END OF DOCUMENT

ADDENDUM D
DOCUMENTS FROM TRIAL RECORD AND FILE

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IN THE FOURTH DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

PATTIE S. CHRISTENSEN, nka PATTI BRUBAKER Plaintiff/Petitioner, vs. DANIEL R. CHRISTENSEN, Defendant/Respondent.	MEMORANDUM ON NAME CHANGE FOR A MINOR CHILD Civil No. 88-400

COMES NOW THE PLAINTIFF, by and through counsel, and as and for a Memorandum on the matter of the name change for the minor child, submits the following:

STATEMENT OF FACTS

1. Petitioner is the Plaintiff in his matter, and is aware of no other proceeding in any other jurisdiction concerning the matters addressed by this Petition.

2. The parties were divorced 17 May, 1990, in this jurisdiction. That Decree was amended by Stipulation, nunc pro tunc, to reflect the date of June 26, 1989.

3. Since the February, 1988, separation of the parties, the child, born in August, 1987, has resided exclusively with the

Plaintiff, who has provided all of the parental care and supervision, through the date of the Plaintiff's marriage to Mr. Brubaker.

4. Plaintiff and her present husband have been married since October, 1989, and the minor child has resided with them as their child. The child was the age of 2 at this time.

5. In or about July, 1991, the Plaintiff filed in Colorado 20th District Court in Boulder, Colorado, Case No. 91C3447-10, a Motion for the change of the child's name to that of Brubaker, to allow the child to legally feel associated with the family with whom she was living, and to cement the relationship of father and daughter that had developed between the child and her step father.

6. As the Defendant had been absent from the child's life for some time, had not paid child support or made attempts for visitation, and his whereabouts could not be ascertained, and attempts at personal service had failed, the Colorado Court permitted service by publication.

7. The Defendant failed to respond or appear for the Motion on the name change, and Plaintiff believed that the Motion would be granted summarily.

8. Until this matter was brought to a head at the Pe Trial recently, the Plaintiff and the Defendant both believed that the Motion had been granted by default.

9. In checking with the Court Clerk in Boulder, it was discovered that the Motion was never granted, and was dismissed by the Court's Motion in July, 1995.

10. In the meantime, with the knowledge and implicit acquiescence of the Defendant father, the child has been using and has been known at school, church, and in the family (specifically sharing this name with her brother) and community, by the name of "Brubaker", for nearly seven years.

11. The child and her family reside in Utah; Mr. Christensen resides in the state of Washington.

12. Mr. Christensen's contact with Stephanie has been minimal. He typically exercises visitation once or twice a year and calls her five or six times a year.

ARGUMENT

THE CHILD HAS USED THIS NAME, AND DEVELOPED A SENSE OF IDENTITY WITH FAMILY AND COMMUNITY, AND SHOULD BE ALLOWED TO KEEP THIS NAME

The child has used the last name of Brubaker for more than five years. She is accustomed to that name. She is known in her community by that name. She shares the last name with the members of her domestic family, including her brother, with whom she is very close. Mr. Christensen has waited six and one half years to address this issue. According to the Hammy test and the

Nellis test, it is in the best interests of the child to maintain the status quo.

The child was born in August, 1987, and has not lived with the Defendant since the parties separation in February, 1988. In October, 1989, Ms. Christensen married Joseph W. Brubaker, and the child has resided with him as her other parent since then.

Stephanie developed a very close relationship with Mr. Brubaker. She refers to him as "dad". Additionally, in July 1990, Mrs. Brubaker gave birth to Chad Michael Brubaker. Stephanie has become very close to her brother. Shortly after Chad's birth, she began to refer to herself as Stephanie Brubaker.

In the summer of 1991, in preparation for Stephanie's entrance into public school, legal action commenced to have the child's name legally changed to Brubaker. Efforts were made to serve Mr. Christensen with notice of the action. However, Mr. Christensen's phone was disconnected and the sheriff for Pierce County was unable to serve Mr. Christensen. The sheriff went so far as to note on the service that Mr. Christensen may have been avoiding service. In accordance with Colorado law, notice was made via publication in the county in which the action was commenced.

The Defendant failed to respond or appear for the Motion on the name change, and Plaintiff believed that the Motion would be granted summarily. Until this matter was brought to a head at the

Pe Trial recently, the Plaintiff and the Defendant both believed that the Motion had been granted by default. In checking with the Court Clerk in Boulder, it was discovered that the Motion was never granted, and was dismissed by the Court's Motion in July, 1995.

In the meantime, with the knowledge and implicit acquiescence of the Defendant father, the child has been using and has been known at school, church, and in the family (specifically sharing this name with her brother) and community, by the name of "Brubaker", for nearly seven years.

Upon resuming contact with the minor child, Mr. Christensen became aware of Stephanie's desire to be called Brubaker. He did not object to this.

Mr. Christensen's contact with Stephanie has been minimal. He typically exercises visitation once or twice a year and calls her five or six times a year.

The child has been known as Stephanie Brubaker throughout her schooling; she is now in the fourth grade. The child has been known as Brubaker in her church for the past 6 ½ years. The child has medical and dental insurance, provided by Joseph Brubaker, in the name of Stephanie Brubaker. The child shares the name of Brubaker with her brother Chad who attends the same school as she. The child receives various mailings under the name of Brubaker. The child is known by her friends and

community as Brubaker. The child is very close to Joseph Brubaker, her mother, and her brother.

THE HAMMY CASE

The leading case in Utah on this issue is Hammy v. Jacobson, 769 P.2d 273 (Utah 1989). In this case, the Court of Appeals of Utah overturned the trial court's order that the minor children bear the surname of the father rather than the mother's surname. The factors that the Court of Appeals listed in determining the decision are:

i. the child's preference in light of the child's age and experience;

ii. the effect of a name change on the development and preservation of the child's relationship with each parent;

iii. the length of time a child has used a name;

iv. the difficulties, harassment or embarrassment a child may experience from bearing the present or proposed name;

v. the possibility that a different name may cause insecurity and lack of identity;

vi. the motive or interests of the custodial parent.

Additionally, this case repeatedly referred to Nellis v. Pressman, 282 A.2d 539 (D.C. 1971). In Nellis, the court also listed the factors it used in determining not to require the

children to change their surnames back to their father's. These factors were:

a) the children have been known in the community for more than five years and had a good relationship with their father during those years,

b) their name and identity have become imbedded in their minds,

c) the likely impact of changing their names back again after all these years,

d) the children's views are entitled to serious consideration because of their ages and level of intelligence, ..

g) the father's physical remoteness from the community where the children reside.

The child's preference

Stephanie Brubaker has been known as such for six and one half years. She requests that her name not be changed now as she is used to her signature of Brubaker. She also wants to have the same last name as her brother who attends the same school as she. Stephanie is currently eight and one half years old. She is very mature and intelligent for her age. She is in fourth grade with a ninth grade reading and comprehension level.

The effect on the parent-child relationship

The relationship of Stephanie and Daniel Christensen has existed for the past six and one half years without any adverse affects caused by the name change. Mr. Christensen failed to respond to the initial Motion to change the name, and has been aware of the name change for at least five years, without taking action. Stephanie has always referred to Mr. Christensen as "Sweetie Pie," and thus her new last name did not affect how she addressed Mr. Christensen.

The length of time name used

Stephanie Brubaker has been known as such for six and one half years. This is a substantial amount of time. It is significant that it has been Mr. Christensen's delay in bringing this matter to the Court's attention that has created the length of time the child has used the name to develop her present identity. Both she and those who know her are used to that name. Her entire schooling has been done under the name of Brubaker. Her health insurance has been carried in the name of Brubaker.

Difficulties, harassment or embarrassment

Changing Stephanie's name at this time would be difficult for her at school. Her peers know her as Stephanie Brubaker and may tease or harass her about a name change. It may also cause difficulties at school with her relationship with her brother,

Chad Brubaker. The name change may also cause confusion as she will be expected to answer to a name other than that to which she is accustomed.

Insecurity and lack of identity

Changing Stephanie's name at this time may cause some insecurity on her part. She has expressed concern about a lack of identity in that all of her other family members are known as Brubaker and she would feel left out of this important family bond. Also, Brubaker is a unique name which allows for greater self-identity whereas Christensen is an extremely common name in this locale.

Motive or interest of custodial parent

Mrs. Brubaker has full custody of the minor child. She would like to see the name remain as Brubaker to prevent any deterioration between the siblings. Additionally, as the child spends about 350 days a year in the Brubaker home and 15 days with Mr. Christensen, keeping the name as Brubaker would allow the child greater stability.

Father's physical remoteness

Mr. Christensen is a domiciliary of Tacoma, Washington. Stephanie and the Brubaker family are domiciled in Sandy, Utah. Changing the child's name to Christensen would not alter these

facts. The father's physical distance, and lack of contact with the child, compel the child's name to remain as Brubaker.

CONCLUSION

It is in the minor child's best interest to have her name remain as Brubaker. She has used this name for six and one half years. She is recognized, and recognizes herself, as Stephanie Ann Brubaker. Stephanie's schooling and medical insurance are listed under the name Brubaker. Brubaker is the name she shares with her sibling who attends the same school as she. The Hammy and Nellis tests are clearly satisfied and compel the child's name to remain Stephanie Ann Brubaker.

DATED this 24 day of JAN, 1996.

MARK K. STRINGER

CERTIFICATE OF DELIVERY

On the 24 day of January, 1996, a copy of the foregoing Order was ~~faxed~~ to Lorie Fowlke ~~at 373-8878~~.
HAND DELIVERED

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

PATTIE CHRISTENSEN, Plaintiff, vs. DANIEL CHRISTENSEN, Defendant,.	CASE NO. 884400400 DA DATE: JANUARY 24, 1996 MINUTE ENTRY STEVEN L. HANSEN, JUDGE TAPE: 967016 #6160-END 967017 #1-END 967018 #1-301 CLERK: SKF

TRIAL - MATTER TAKEN UNDER ADVISEMENT

This matter came before the Court for trial on the Petition to Modify with Mark Stringer representing the plaintiff and Lorie Fowlke appearing for the defendant. Both parties were present.

As Ms. Fowlke had no objection, the Court granted Mr. Stringer's request to verbally modify the Petition to Modify the Decree regarding the child's name change. Patty Christensen Brubaker was sworn and testified. Daniel Christensen was sworn and testified. Pattie Brubaker was recalled to the stand in rebuttal. Joseph Brubaker was sworn and testified. The Court took the matter under advisement. Counsel are to submit Proposed

Findings of Fact and Conclusions of Law. Counsel will also submit affidavits regarding attorney fees

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IN THE FOURTH DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

PATTIE S. CHRISTENSEN, nka PATTI BRUBAKER Plaintiff/Petitioner, vs. DANIEL R. CHRISTENSEN, Defendant/Respondent.	PLAINTIFF'S PROPOSED FINDINGS AND CONCLUSIONS ON NAME CHANGE Civil No. 88-400

COMES NOW THE PLAINTIFF, by and through counsel, and as and for proposed findings and conclusions on the matter of the name change of the minor child, submits the following:

FINDINGS OF FACT

1. Petitioner is the Plaintiff in his matter.

2. The parties agreed at Trial, that the Petitioner could orally amend the Petition to include a request that the child's name be changed to "Brubaker".

3. There is no other proceeding in any other jurisdiction concerning the matters addressed by this Petition.

4. The Parties were married at the time of the July, 1987 birth of the child.

5. The Parties separated in or about February, 1988, and the child remained with the Plaintiff.

6. The parties were divorced 17 May, 1990, in this jurisdiction. That Decree was amended by Stipulation, nunc pro tunc, to reflect the date of June 26, 1989.

7. Under the terms of paragraph 2 of the Decree, reached by stipulation between counsel and the parties, the Plaintiff retained custody, and the Defendant was granted the following visitation:

> Twelve days of visitation every three months,
> plus one half of the Summer school vacation.

This visitation schedule provided for at least 36 days of school period visitation, and at least 30-45 days of the summer.

8. In the Decree, the Defendant was ordered to pay a regular monthly child support, half by the 5th and half by the 20th.

9. In October, 1989, the Plaintiff married Joseph Brubaker.

10. At the time of the marriage to Mr. Brubaker, the child was age 2, and had lived about four months with the Defendant, and the balance of her life with the Plaintiff.

11. Since the marriage of the Plaintiff to Mr. Brubaker, Mr. Brubaker has performed the role of father to the child: attending school conferences and functions, providing for and accompanying

the child to medical visits and services, and attending church and related functions with the child.

12. Since the birth of the child, the Defendant has neither attended school functions nor requested records, has neither attended medical services with the child nor requested records, has attended some church with the child, but has not requested records.

13. In August, 1995, the child was baptized into the LDS faith. She was baptized by Mr. Brubaker.

14. The Defendant was given advance notice of this event in a telecon with the child, but did not attend or object to the fact that Mr. Brubaker was the person performing what is traditionally the right of the father.

15. The Defendant considers himself to be a member of the LDS faith, but does not consider himself to be active.

16. The Defendant has exercised visitation generally about three times a year, for a couple of days per visit, with the exception that he had summer visitation of a week to a few weeks, gradually as the child got older. This is less than his allotted visitation: both that initially ordered in the Decree, and that expanded to more Christmas and Easter and Summer visitation in the 1992 Modification). The Defendant explains his lack of visitation as generally a function of the distance between residences, and the associated costs.

17. The Court takes judicial notice that it is difficult for a small child to develop or maintain a parent-child bond with intermittent visitation every few months for a few days at a time.

18. The Decree has been modified, and the parties have been in court on temporary orders, orders for contempt regarding visitation and child support, or modification on numerous occasions:

a. February, 1991, judgment for unpaid financial obligations, including at least $2000 in delinquent child support.

b. March, 1991, visitation and child support issues

c. November, 1991, visitation and child support issues

d. August, 1992, Modification of Decree, child support and visitation.

e. August, 1993, visitation matters

f. April, 1994, Petition to Modify

g. May, 1994, judgment for $3996.62 for unpaid child support.

h. September, 1994, unpaid child support and other financial obligations

i. December, 1995, OSC regarding visitation and name change.

j. January, 1996, judgment for $3,000 in unpaid child support and related financial obligations.

19. In responding to questions concerning child support delinquencies, the Defendant seemed to allege that he had remained current, and was unsure why the various judgments had been ordered. Defendant was less than candid with the Court.

20. Defendant admits being aware of the defacto name change of the child to "Brubaker" first when the child was age three or four, in about 1991, when the child was practicing writing her name.

21. The Defendant admits being aware of the defacto name change of the child to "Brubaker", and discussing this with the Plaintiff periodically over the years.

22. The Defendant admits being aware of the defacto name change of the child, as early as the 1992-1993 matter in Court, and alleges that he included the issue in his pleadings.

23. The Defendant admits that he neither brought the matter before the Court, nor filed subsequent action by way of appeal, motion, contempt, or modification for the Court's failure to act on the issues of the name change at the earlier dates.

24. In or about July, 1991, the Plaintiff filed in Colorado 20th District Court in Boulder, Colorado, Case No. 91C3447-10, a Motion for the change of the child's name to that of Brubaker, to allow the child to legally feel associated with the family with whom she was living, and to cement the relationship of father and daughter that had developed between the child and her step father.

26. At this time, the Defendant had been absent from the child's life for some time, had not remained current on child support or exercised all of the visitation awarded to him.

27. The Plaintiff attempted to personally serve the Defendant, but he had changed addresses and phone number, and his whereabouts could not be ascertained, and attempts at personal service had failed, so the Colorado Court permitted service by publication.

28. The Defendant failed to respond or appear for the Motion on the name change, and Plaintiff believed that the Motion would be granted summarily.

29. Until this matter was brought to a head at the PreTrial recently, the Plaintiff and the Defendant both believed that the Motion had been granted by default.

30. In checking with the Court Clerk in Boulder, it was discovered that the Motion was never granted, and was dismissed by the Court's Motion in July, 1995.

31. In the meantime, with the knowledge and implicit acquiescence of the Defendant father, the child has been using and has been known at school, church, and in the family and community, by the name of "Brubaker", for nearly seven years.

32. The child has developed a very close relationship with Mr. Brubaker. She refers to him as "dad".

33. In July 1990, Mrs. Brubaker gave birth to Chad Michael Brubaker. Stephanie has become very close to her brother.

Shortly after Chad's birth, she began to refer to herself as Stephanie Brubaker.

34. The child has been known as Stephanie Brubaker throughout her schooling; she is now in the fourth grade. The child has been known as Brubaker in her church for the past 6 ½ years.

35. If the child is not allowed to retain the name she has used for nearly seven years, she will be the only member of her family with a different name.

36. The child and her family reside in Utah; Mr. Christensen resides in the state of Washington.

37. Applying the tests set down in HAMBY, the Court considers:

i. the child's preference in light of the child's age and experience;

ii. the effect of a name change on the development and preservation of the child's relationship with each parent;

iii. the length of time a child has used a name;

iv. the difficulties, harassment or embarrassment a child may experience from bearing the present or proposed name;

v. the possibility that a different name may cause insecurity and lack of identity;

vi. the motive or interests of the custodial parent.

Additionally, the Court considered the factors from the related case of Nellis v. Pressman, 282 A.2d 539 (D.C. 1971), referred to in HAMBY:

a) the children have been known in the community for more than five years and had a good relationship with their father during those years,

b) their name and identity have become imbedded in their minds,

c) the likely impact of changing their names back again after all these years,

d) the children's views are entitled to serious consideration because of their ages and level of intelligence, ..

g) the father's physical remoteness from the community where the children reside.

38. The child's preference. Stephanie has used the name of Brubaker in school church, and community for six and one half years. She has herself expressed a desire to use this name. She refers to Mr. Brubaker as "dad".

39. The effect on the parent-child relationship. The relationship of Stephanie and Daniel Christensen has existed for the past six and one half years without any adverse affects caused by the name change. Mr. Christensen testified that, given the lack of regular contact and visitation, he enjoyed a close relationship with the child. Her choice of last name during the past years, has not eliminated her recognition of him as her

father. Mr. Christensen failed to respond to the initial Motion to change the name, and has been aware of the name change for at least five years, without taking action. If there has been a detrimental effect by the use of the different last name, the delay has been at least in part a result of Mr. Christensen's failure to act when the issue first came up. Stephanie has always referred to Mr. Christensen as "Sweetie Pie," and thus her new last name did not affect how she addressed Mr. Christensen.

40. The length of time name used. Stephanie Brubaker has been known as such for six and one half years. This is a substantial amount of time. It is significant that it has been Mr. Christensen's delay in bringing this matter to the Court's attention that has, at least in part, created the length of time the child has used the name to develop her present identity. Both she and those who know her are used to that name. Her entire schooling has been done under the name of Brubaker. Her health insurance has been carried in the name of Brubaker. Her church affiliation , and her recent baptism have used the name Brubaker.

41. Difficulties, harassment or embarrassment. Changing Stephanie's name at this time would be difficult for her at school, church, and in the community. Her peers and siblings know her as Stephanie Brubaker and may tease or harass her about a name change. It may also cause difficulties at school with her relationship with her brother, Chad Brubaker. The name change

may also cause confusion as she will be expected to answer to a name other than that to which she is accustomed.

42. Insecurity and lack of identity. Changing Stephanie's name at this time may cause some insecurity on her part. She has experienced concern and anxiety if at this point she is forced to assume a lack of identity with her other family members known as Brubaker, and she may feel left out of this important family bond.

42. Motive or interest of custodial parent. Mrs. Brubaker has full custody of the minor child, and except for brief periods of visitation, has provided (with her present husband) essentially all of the parenting. While there has been some discussion as to her motives for the name change, and while her motives may be suspect to some degree, it is significant to note that she waited until the child was entering school, and had a sibling with the last name of Brubaker, to make the formal Petition in Colorado. She states that she would like to see the name remain as Brubaker to prevent any deterioration between the siblings, and to support Stephanie's own sense of identity.

43. Father's physical remoteness. Mr. Christensen is a resident of Washington state. Stephanie and the Brubaker family are domiciled in Sandy, Utah. Changing the child's name to Christensen would not alter these facts. The father's physical distance, and his own admission that more frequent contact is unlikely, support the child retaining the name of Brubaker.

44. The NELLIS factors of a) the child's identity in the community, b) the child's own sense of identity and choice of last name, c) the likely [negative] impact of changing the name back again after all these years, d) consideration of the child's ages and level of intelligence, and g) the father's physical remoteness from the community where the child resides, have been considered, and while not controlling, are persuasive in considering the name change.

45. The Plaintiff does not appear to have acted in bad faith in supporting the child's defacto name change prior to 1991, and appears to have honestly, albeit mistakenly, believed that the Colorado name change was completed.

46. While the Plaintiff may appear to harbor some ill will toward her ex husband, and may in small part be seeking the name change to distance herself and the child from Defendant, she appears also to be honestly concerned most with the child's sense of identity, and association with the rest of the combined family.

47. In seeking the Court's review of the defacto name change at this late date, despite having known of the matter years ago, and at the time of several post-divorce proceedings where the matter might have been addressed more timely, the Defendant has created much of the problem he seeks to remedy.

BASED UPON the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. The Court has jurisdiction to hear the matter of the name change of the child from Christensen to Brubaker.

2. Based upon the HAMBY test factors, a review of the procedural history of this case, the intermittent nature of the visitation, the child's present family circumstances, and the defacto name change of the child for over 6 1/2 years, the child's best interests will be met by allowing her to retain the name she has chosen and used: Stephanie Brubaker.

3. The fact that the Defendant had known of the defacto name change for years, and specifically at times when both parties returned to Court for Orders and modifications, may be reason to impose the doctrine of Res Judicata. The Defendant may be estopped from now raising an issue he should have and could have brought to the Court's attention on a more timely basis. However, because the name change is supported by other factors, and the Court is most concerned with addressing the merits of the name change, the Court declines to render a final opinion on this issue.

4. While the Defendant has created substantial delay in failing to bring this matter earlier, and while the Plaintiff may be operating in some part out of self-interest to distance

herself from the Defendant, it does not appear that either party has acted in bad faith, and therefore no fees or costs should be awarded.

5. The Court should issue an Order changing the name of the child, nunc pro tunc to the date the matter was to have been decided by the Colorado Court, July, 1991. The nunc pro tunc aspect of the Order is to support legally what has happened as a matter of fact, and to validate to the extent necessary, the various records which exist in the child's last name of Brubaker.

DATED this _____ day of _____, 1996.

BY THE COURT:

_____
STEVEN HANSEN, JUDGE

CERTIFICATE OF DELIVERY

On the ___ day of _____, 19___, a copy of the foregoing Order was faxed to Lorie Fowlke at 373-8878.

_____

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

PATTIE S. CHRISTENSEN, nka PATTI BRUBAKER Plaintiff/Petitioner, **vs.** DANIEL R. CHRISTENSEN, Defendant/Respondent.	CASE NO. 88-400 DATE: March 12, 1996 **FINDINGS OF FACT AND CONCLUSIONS OF LAW** JUDGE STEVEN L. HANSEN

This matter came before the Court on January 24, 1996 for hearing on Plaintiff's Petition to Modify the decree of divorce to change the surname of the parties' minor child from Christensen to Brubaker. After hearing testimony from both parties and plaintiff's current husband, Joseph Brubaker, the court took the matter under advisement and ordered each party to submit proposed Findings of Fact and Conclusions of Law. Having received and considered those proposed findings, the Court now enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The issue of the name change of the minor child was brought to the Court's attention by Defendant's Order to Show Cause filed with this Court on December 1, 1995, in conjunction with a request for contempt for Plaintiff's failure to allow visitation and to pay her share of travel costs. That Order to Show Cause asks the Court to order that the parties' minor child be designated by her legal name, Christensen, and not by the name Brubaker.

2. As all other issues in Defendant's Order to Show Cause were resolved by stipulation, and Defendant desired prompt resolution of the name change issue, he agreed at a hearing on the name change issue that Plaintiff could orally amend her Petition to Modify to include a request that the child's name be changed.

3. All other issues raised by Plaintiff's Petition to Modify have also been resolved by stipulation.

4. There is no other proceeding in any other jurisdiction concerning the matters addressed by this Petition.

5. These parties were married on January 16, 1987 in Springville, Utah, and their minor child, Stephanie Ann Christensen, was born July 20, 1987.

6. The above-named parties were divorced on May 17, 1990. Plaintiff married Joseph Brubaker in October, 1989. On May 24, 1990, Plaintiff moved the Court to grant the divorce *nunc pro tunc* to June 26, 1989, a date before the date of her marriage to Joseph Brubaker.

7. At the time of the divorce, the daughter of the parties, Stephanie Ann Christensen, was nearly two (2) years old.

8. Since the time of the separation of the parties, Plaintiff has had custody of the minor child subject to Defendant's right to reasonable visitation. There is no provision in the Divorce Decree allowing Plaintiff to change the surname of the parties' minor child.

9. Since the marriage of the Plaintiff to Joseph Brubaker, Mr. Brubaker has attempted to be an appropriate step-father, and Defendant expressed his appreciation for that fact.

10. Chad Michael Brubaker, the son of Plaintiff and her husband Joseph Brubaker, was born July 12, 1990, and presently bears the surname Brubaker.

11. Stephanie and Chad have enjoyed a healthy and loving sibling relationship.

12. Defendant moved to the State of Washington shortly after the time of the parties divorce and has only changed apartments in the same apartment complex since that time.

13. Plaintiff has moved on at least four (4) or more occasions, having lived in Utah, Colorado, Oklahoma, and Florida since the divorce. Plaintiff presently resides in Utah.

14. Since the parties' divorce, Defendant has visited the child approximately three to five times per year. While the child was quite young, these visits were for only a few days at a time. As the child has grown older and more independent, the frequency and length of Defendant's visits have increased.

15. Defendant has repeatedly encountered substantial difficulty in exercising his visitation rights with the parties' minor child, due in part to the distance between the parties and in part to Plaintiff's frequent moves and her reluctance to abide by the visitation schedule and to bear some of the travel costs as ordered by the Court.

16. Defendant has frequently had to bring legal proceedings to protect and enforce his visitation rights.

17. In 1992, Defendant filed a petition to modify seeking a reduction in his child support obligation and increased visitation. That petition was granted in August 1992.

18. In August of 1993, Defendant obtained a judgment against Plaintiff for Plaintiff's contempt in preventing Defendant's visitation with the parties minor child. Plaintiff was ordered to provide the child for visitation the remainder of the summer, which was only one (1) week, and to pay visitation costs and attorney's fees. Defendant exercised his visitation for that remaining week.

19. Defendant's Order to Show Cause filed on December 1, 1995 also claimed that Plaintiff had again refused to make the child available for visitation per the Decree in 1994. As part of the settlement of all issues in January 1996, the parties stipulated that Defendant should have make-up visitation this Easter, 1996.

20. The Modified Divorce Decree indicates Defendant is entitled to one-half of Christmas vacation, Easter vacation in odd numbered years, and one-half of summer vacation with transportation costs to be split equally between the parties.

21. Until credit for travel was given as part of a recent settlement, Plaintiff had never reimbursed Defendant for travel costs incurred in exercising visitation with the minor child.

22. When asked about her resistance to Defendant's exercising his visitation, Plaintiff responded that visitation "is not really exercised anyway, so I don't pay much mind to it."

23. Plaintiff has failed to apprise Defendant of important events in the child's life about which the natural father should have been informed.

24. As Plaintiff testified, she and her immediate family refer to Defendant as "Sweetie-pie" instead of as Stephanie's father.

25. Defendant only recently became aware that in July of 1991 Plaintiff had retained counsel in Colorado in an unsuccessful attempt to change Stephanie's legal name to Brubaker. Plaintiff's attorney filed the name change action in Colorado, and Plaintiff claimed by affidavit that she was unable to locate Defendant.

26. On cross-examination, Plaintiff testified that at the time she filed in Colorado, the parties were "continually" involved in litigation in the State of Utah. The record indicates that each party had one or more Order to Show Cause pending at that time.

27. In her Colorado petition, Plaintiff alleged that the natural father could not be located, had failed to pay child support, had not responded to Plaintiff's efforts to collect that support, and that Plaintiff had remarried, and that she and her new husband desired the child to share their last name.

28. According to Plaintiff's testimony at hearing, she never approached Defendant's counsel in Utah about accepting service or contacting the Defendant concerning the name change

issue, nor did she specifically tell her attorney in Colorado that litigation was pending in another jurisdiction. She believed, however, that her attorney in Colorado knew of the litigation in Utah.

29. Plaintiff was also aware that Defendant had family in Utah who would know how to contact him.

30. Defendant received no notice of any Petition filed in the State of Colorado or anywhere else in reference to the change of the surname of the parties' minor child. Defendant first learned of the Colorado action during the pretrial hearing held in this Court on January 12, 1996, pursuant to a conversation with Plaintiff at that time.

31. Plaintiff claims that Defendant is not current on his child support; however, a review of the judgments entered in the history of this case indicate that the Defendant has paid his child support regularly since the time of the divorce and that all judgments entered in this case are for sums due for the temporary child support and alimony during the separation of the parties and the difference in child support amounts accrued during the pendency of Defendant's Petition to Modify, plus interest.

32. Defendant believed that the previous judgments entered in this case had been paid by the funds held in escrow from the sale of the marital home, as only Plaintiff had access to the escrow account.

33. The Stipulation entered into by the parties in January, 1996, represents the child support arrearage accrued during the time the Defendant's Petition to Modify was pending, as well as a credit to Defendant for travel expenses and attorney's fees awarded to him in previous actions.

34. Defendant was aware that the minor child of the parties had learned to write her name as "Stephanie Ann Brubaker" pursuant to the direction of Plaintiff, which caused Defendant to express his concern and disapproval to Plaintiff on at least two occasions.

35. Defendant has never given his permission for the surname of the minor child to be changed from "Christensen" to "Brubaker" and has, in fact, mentioned to Plaintiff on several occasions his disapproval of such change

36. Defendant admits being aware of the Plaintiff's de facto name change of the child to "Brubaker" first when the child was age three or four, in about 1991, when the child was practicing writing her name, inquired about it, and objected to the change .

37. No Petition had been filed by either party in the State of Utah to change the surname of the parties' minor child prior to this action.

38. Defendant always buys plane tickets for the parties' minor child in the name of "Stephanie Christensen."

39. Defendant had no knowledge of any school records or church records being changed to the name of Brubaker prior to this trial, though he had never requested such records.

40. Defendant is employed as a respiratory therapist at a hospital in the State of Washington, and there is nothing in his personal or professional life which would cause embarrassment, harassment, or other difficulty to the minor child if she were to retain the surname Christensen.

41. The minor child has paternal relatives in the State of Utah, many of whom bear the surname Christensen. The minor child of the parties knows these individuals and associates with them during her time with her father, the Defendant.

42. The parties' minor child has attended home school until this last year, beginning Fall of 1995.

43. Plaintiff wishes to change the surname of the parties' minor child to that of her current husband. She has both physically and emotionally distanced Stephanie from Defendant in an effort to include her in Plaintiff's present family unit to the exclusion of Defendant.

44. Plaintiff's husband, Joseph Brubaker, has not adopted the parties' minor child and has not been Court ordered to provide support for this child.

45. Plaintiff has on more than one occasion asked Defendant if he would allow their minor child to be adopted by Plaintiff's current husband, and Defendant has consistently refused.

46. Plaintiff has referred to the judgments against the Defendant in encouraging him to agree to the adoption of Stephanie by Mr. Brubaker.

47. Defendant has expressed a desire to maintain his relationship with his child and believes that changing the child's name will weaken and diminish the relationship he and his daughter presently enjoy.

48. The minor child of the parties, Stephanie Ann Christensen, is now eight (8) years old. Although Plaintiff has represented to the Court that the child desires to be known by the name Brubaker, the Court finds that this desire, if true, has been fostered largely by Plaintiff's encouraging the child to write and use that name, since the child is of such tender years that she has little independent judgment in this matter.

49. No expert testimony or academic literature has been offered regarding any possible effects of a name change.

Having made the foregoing Findings of Fact, the Court now hereby makes the following:

CONCLUSIONS OF LAW

1. The Court has jurisdiction to hear this matter as raised by Defendant's Order to Show Cause and Plaintiff's Amended Petition to Modify.

2. The ruling standard of law states that the "best interests of the child is the paramount consideration in determining whether a child's name should be changed." Hamby v. Jacobson, 769 P.2d 273 (1989).

3. Plaintiff has not met her burden of persuading the Court that a change in the legal name of Stephanie Christensen is in the child's best interests.

4. Some of the factors a Court should consider in light of the circumstances of each case were recognized in Hamby and include:

(1) The child's preference in light of the child's age and experience;

(2) The effect of a name change on the development and preservation of the child's relationship with each parent;

(3) The length of time a child has used the name;

(4) The difficulties, harassment or embarrassment a child may experience from bearing the present or proposed name;

(5) The possibility that a different name may cause insecurity and lack of identity; and

(6) The motive or interest of the custodial parent.

5. While the Court accepts the legal standards outlined in Hamby and has considered the factors listed above, the Court distinguishes the facts in Hamby from those in the present case. The children whose names were at issue in Hamby had been born out of wedlock. One child had been known by his mother's surname since birth, and the surname of the second had been in dispute since its birth. The reputation of the natural father in Hamby was likely to cause embarrassment to the children, and other factors indicated it was in the best interests of the children to go by their mother's surname.

In the case at bar, however, the child whose name is at issue was born to the parties at the time they were legally married. At that time, both Plaintiff and Defendant went by Christensen, and the child was given the surname Christensen, by which she was known while the parties were married, at the time of divorce, and until about the time the Brubaker's son was born. Sometime following the birth of the Brubaker's son Chad, Plaintiff and her new husband began referring to the parties' child as Stephanie Brubaker, a practice that Stephanie has accepted.

While the father of the children in Hamby was abusive and an embarrassment to his children, the natural father in the present case is loving, caring and respectable. There is nothing in his character or behavior which would cause embarrassment to his child if she continues to go by the surname Christensen.

Therefore, while Hamby provides some guidance to the Court, it was decided on different facts and does not dictate the outcome in the present case.

6. Hamby, restricted to its facts, holds that when a child is born out of wedlock, there is neither a preference for the paternal surname nor a presumption that the custodial parent's choice of surname should govern. However, when a child is born to two parents who are married and share the same last name, and when the child has been known by that name since birth, there is legal precedent to change the name only upon a convincing showing that the change is in the best interests of the child. "Once a surname has been selected for a child, be it the maternal, paternal, or some other combination of the child's parents' surnames, a change in the child's surname should be granted only when the change promotes the child's best interests." Daves, 711 P.2d at 318.

7. In developing the factors in Hamby, the Court considered the related cases of Daves v. Nastos, 711 P.2d 314 (Wash. 1985) and In Re Marriage of Omelson, 445 N.E.2d 951 (Ill. App. 1983), which are persuasive though not binding.

8. Courts traditionally should try to maintain and encourage continuing parental relationships. Omelson, 445 N.E.2d at 956 citing Robinson v. Hansel, 223 N.W.2d 138 (Minn. 1974).

9. Defendant has brought appropriate court action to enforce or increase visitation, and has made reasonable efforts to exercise his visitation when possible, indicating a concerted effort on his part to establish and maintain a relationship with his daughter.

10. Other jurisdictions, almost uniformly, have rejected contentions that a child's psychological health requires that his name conform to that adopted by his mother on remarriage. Omelson, 445 N.E.2d at 957, citing Application of Lone, 338 A.2d 883 (N.J. 1975). See, e.g, Degerberg v. McCormick, 187 A.2d 436 (Del. 1963); Mark v. Kahn, 131 N.E.2d 758 (Mass. 1956); Robinson v. Hansel, 223 N.W.2d 138 (Minn. 1974), West v. Wright, 283 A.2d 401 (Md. 1957); Application of Trower, [260 California App.2d 75,67 California Reporter 873]; Application of Shipley, 205 N.Y.S.2d 581; Application of Hinrich, 246 N.Y.S.2d 25; Marshall v. Marshall, 93 So.2d 822 (Miss. 1951); Reid v. Reid, 838 P.2d 350 (Okl. 1959); *Contra* King v. Newman, 421 SW.2d 149 (Tex. Civil App.) In Re Adoption of McCoy, 287 N.E.2d 833 (Ohio 1972).

Child's Preference

11. The Hamby case indicates that a child's preference may be considered "in light of the child's age and experience." The children involved in Hamby were six (6) years old and the Court held that they were "too young to be accustomed" to their surname.

The Hamby Court cites to Daves v. Nastos, 711 P.2d 314 (Wash. 1985) in presenting this factor as relevant for consideration in determining a child's best interest. In Daves, the Court was considering an out-of-wedlock paternity action in which the children were under two (2) years of age, and it only lists that factor without application to that case. In In Re Marriage of Omelson, 445 N.E.2d 951 (Ill. App. 1983), also cited in Hamby, the child was almost eight (8) years old. The Court gave no weight to the minor child's desires and cited to Mark v. Kahn, supra, in which the Court held that a child of the age of twelve (12) was not capable of making an intelligent choice in the matter of his name. In Omelson, the Court denied the request for name change and indicated that a child should await her maturity and leave the decision to a time when she would be aided by her own desires and perceptions and not subject to the suggestion and desires of her mother. Id. at 958.

12. Stephanie Christensen is eight (8) years old. Plaintiff claims Stephanie has expressed a desire to use the name of "Brubaker." Even if this were true, the Court can give little weight to this statement in light of the child's tender age and lack of experience as to the consequences of these matters.

Effect of Name Change on Child's Relationship With Each Parent

13. The testimony of Plaintiff and Plaintiff's husband, Joseph Brubaker, indicate that Stephanie has a positive relationship with both of them and with her half-brother. There is no testimony to indicate that the nature of this relationship would be enhanced by changing of Stephanie's surname from "Christensen" to "Brubaker." Rather, the testimony of both Mr. and Mrs. Brubaker indicated that they both love and care for Stephanie in the same way they love and care for their son. The Court is satisfied that Plaintiff and her current husband would continue to love and accept Stephanie regardless of her legal surname. The Brubaker's are mature, loving, and secure in their family relationships and have helped Stephanie be secure in her identity and relationship with them and her younger brother.

On the other hand, a name change at this time could negatively impact Defendant's relationship with his daughter, which is positive but difficult to maintain given the physical distance between the Defendant and his child and Plaintiff's efforts to weaken that bond through continual interference with visitation, the family's minimizing Defendant's role in Stephanie's life, and by, some could argue, a derogatory reference to him as "sweetie-pie" instead of as Stephanie's father.

14. In these circumstances, a "change of name [is] not be in the child's best interest" since "the effect of such change is to contribute to the further estrangement of the child from a father who exhibits a desire to preserve the parental relationship." In Re Marriage of Omelson, 445 N.E.2d at 956, citing Mark v. Kahn, 131 N.E.2d 758 (Mass. 1956) and 53 A.L.R.2d 908. "[C]ourts have traditionally tried to maintain and to encourage continuing parental relationships.

The link between a father and a child in circumstances such as these is uncertain at best and a change of name would further weaken if not sever such a bond." 445 N.E.2d at 956, citing Robinson v. Hansel, 223 N.W.2d 131, 138 (Minn. 1974).

The Court considers the fostering of a loving and respectful bond between Stephanie and the Defendant to be a compelling reason to deny Plaintiff's motion for a name change.

Length of Time Name Used

15. The evidence is unclear as to how long the Plaintiff has been using the name "Stephanie Brubaker" for the minor child of the parties, Stephanie Ann Christensen. Plaintiff claims the church and school records are in the name of "Stephanie Brubaker." However, the parties' minor child has been in private school until six (6) months ago when the parties moved back to Utah.

16. For the initial years of the Stephanie's young life she went by Christensen.

17. Defendant has always referred to the child as "Stephanie Christensen" and has conducted all business for the child in that name.

18. The Plaintiff has moved at least four (4) times in the years since the divorce and has only been in the present community since the Summer of 1995. Therefore, even if the Plaintiff has been using the name of "Stephanie Brubaker," it is only relevant in this community since the Summer of 1995.

19. Testimony indicated that Stephanie is not likely to be detrimentally affected if her peers or others were to comment on her use of her legal surname.

Difficulties, Harassment or Embarrassment from the Present or Proposed Name.

20. Plaintiff has claimed that it would be inconvenient to change records for the minor child of the parties if she retains the legal name of "Stephanie Christensen" as she has been using the name of "Stephanie Brubaker" and she may be teased or harassed about a name change. The

Court is unconvinced that significant harassment is likely to occur if Stephanie retains the legal name of "Christensen."

As indicated in Omelson, it is just as likely a child will be teased about a different name when visiting her father, or if her mother later died or divorced the man whose last name the child has taken. That court concluded that "whatever the nature of the `harassment' of the children by their peers, it would seem that it was in this case surely no more severe than [that] faced by thousands of other similarly situated children in a day when broken homes have become commonplace." Omelson, 445 N.E.2d at 957, citing Robertson v. Hansel, supra, citing Application of Lone, supra. The court further noted that the mother's fears rise no higher than apprehension and that there was no evidence to support them.

There is no evidence that Stephanie will be harassed or embarrassed if her name remains "Christensen" any more than she would be if her name were changed to "Brubaker." This situation is unfortunately the same as many children throughout this country does not represent sufficient grounds to change her surname to that of her mother's current husband.

Possibility of Insecurity and Lack of Identity

21. Plaintiff claims that the minor child of the parties may suffer insecurity if she has a different name than the other members in her current family unit. However, there was no evidence presented to support that claim and the Court cannot conclude the child's psychological health requires her name to be the same as that of her mother upon remarriage. In fact, the evidence suggests that Stephanie will continue to be accepted by the Mr. Brubaker and her half-brother even if she does not share the same last name. Plaintiff and her new husband appear to be loving, protective, and emotionally secure parents who will instill in Stephanie an assurance that she is loved and accepted in their family as well as by Defendant.

22. Testimony and reasonable inferences therefrom strongly indicate that retention of the surname "Christensen" will assist the child in recognizing the Defendant as her natural father and developing a secure and loving relationship with him.

23. As no evidence has been presented which indicates the parties' minor child shall suffer any insecurity or lack of identity by retaining the name of "Christensen," this is not sufficient grounds to grant Plaintiff's request.

Motives or Interest of Custodial Parent

24. In determining whether a change of name is in the best interests of a child it is well to consider whether the interests of others are sought to be served by the proceeding. In Re Marriage of Omelson, 445 N.E.2d at 955. Although the interest of a mother and child will frequently coincide, they can frequently diverge. When a name change is at issue the custodial mother's interest is potentially adverse to the best interest of the child. Care must be taken to assure that the mother's interests do not dictate the termination of the child's best interest. Daves, 711 P.2d at 318-319; Omelson, 445 N.E.2d at 955. (Special care is required when the minor is of tender years to assure that some purpose of the custodial parent does not taint the determination of the child's best interest.)

25. Several actions by Plaintiff cast suspicion on her motives in seeking a name change for her child at this time:

A. Plaintiff has moved frequently, but has not promptly provided Defendant her phone number and address, which has interfered with Defendant's visitation with his daughter. Plaintiff has been held in contempt by previous judges in this case for interference with Defendant's visitation.

B. Plaintiff has not, until recently, reimbursed Defendant for her half of the costs of travel for visitation that she was ordered to bear.

C. Plaintiff has attempted to change the name of the child without due notice to Defendant;

D. Plaintiff has repeatedly downplayed the role of the natural father in her child's life, referring to him as "Sweetie-pie," at least tacitly discouraging Stephanie from using her father's surname, and denying visitation on such grounds as it would interfere with the child's home schooling or would be inconvenient to Plaintiff at the time.

These actions cause the Court to question whether Plaintiff has placed her own interests over the best interest of the parties' daughter in seeking to change Stephanie's last name from Christensen to Brubaker. While the Court commends Plaintiff for strengthening Stephanie's bond with her half-brother Chad and with Mr. Brubaker, this should not be done by diminishing in any way the relationship Stephanie should continue to enjoy with her natural father.

While a mother may petition for a name change for a variety of reasons, which may include punishing the ex-husband and father, proving her endearing devotion to her new husband, showing her new husband all ties to her former marriage are broken, presenting to the community a facade of a unitary family, or to hiding the fact that the mother has previously been through a divorce, all of these reasons serve the interests of the mother. These motives do not necessarily consider the best interest of the child, which must be the paramount consideration. Plaintiff's unwillingness to foster a relationship between the Defendant and the parties' minor child and her encouraging the child's use of the surname "Brubaker" indicate a concerted attempt to diminish the child's relationship with the Defendant.

While Defendant has encouraged his daughter to use and be proud of her name, and has encouraged Stephanie to be happily involved in Plaintiff's family, Plaintiff has at least tacitly encouraged the child to disregard her natural father.

The court concludes that Plaintiff, in filing the petition to change the child's surname, has been motivated by her own interests and has not considered, foremost, what would ultimately be in the best interests of her daughter.

26. Based upon the factors detailed in Hamby v. Jacobson, the court rules that the best interests of the child shall be served by the minor child retaining her current name, "Stephanie Ann Christensen."

27. Plaintiff's petition to change the name of the parties' minor child is denied, and Plaintiff is ordered to notify the custodians of Stephanie's school, church, and social records of her legal name.

28. Regarding attorney's fees, §30-3-5 UTAH CODE ANNOTATED, as amended, provides that if a Petition for Modification is made and denied, the court shall order the Petitioner to pay the reasonable attorney's fees expended by the prevailing party in that action if the court determines that the Petition was without merit and not asserted or defended against in bad faith.

While Plaintiff has, in the past, attempted to manipulate or circumvent the legal system by unilaterally changing the name of the parties' child, the Court determines that the present action to determine whether a name change is proper has been brought by agreement of both parties, that Plaintiff has not shown bad faith or lack of candor in the present action, and therefore each party is ordered to bear his or her own costs and attorney's fees.

Counsel for the Defendant is ordered to prepare an Order consistent with the terms of these Findings of Fact and Conclusions of Law and submit it to counsel for the plaintiff prior to submission to the Court for signature.

DATED and signed this 12 day of March, 1996.

Judge Steven L. Hansen

ORIGINAL IF IN FILE
STATE OF UTAH
FOURTH DIST. COURT - UTAH COUNTY

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IN THE FOURTH DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

PATTIE S. CHRISTENSEN, nka PATTI BRUBAKER, Plaintiff/Petitioner, vs. DANIEL R. CHRISTENSEN, Defendant\Respondent.	**ORDER** Civil No. 88-400

This matter came before the Court on January 24, 1996, for a hearing on Plaintiff's Petition to Modify the Decree of Divorce to change the surname of the parties' minor child from "Christensen" to "Brubaker." After hearing testimony, taking the matter under advisement, and entering its Findings of Fact and Conclusions of Law, the Court hereby,

ORDERS, DECREES, and ADJUDGES as follows:

1. Plaintiff's Petition to change the surname of the parties' minor child is denied, and Plaintiff is ordered to notify the custodians of Stephanie's school, church and social records of her legal name.

2. Each party is ordered to bear his or her own attorney's costs and fees in this matter.

DATED and signed this 28th day of March, 1996.

/S/
Judge Steven L. Hansen

Approved as to form:

Mark Stringer
Attorney for Plaintiff

ADDENDUM E

SELECTED EXCERPTS FROM TRIAL TRANSCRIPT / RECORD

IN THE FOURTH DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

==========

PATTIE S. CHRISTENSEN, Plaintiff, vs. DANIEL R. CHRISTENSEN, Defendant.	TRIAL Petition to Modify Dist. No. 884400400DA APPEAL #_____ Hon. Steven Hansen

BE IT REMEMBERED that on the 24th day of January, 1996 this matter came on for hearing before the above-named court.

WHEREUPON, all parties appearing and represented by Counsel, the following proceedings were held:

A-P-P-E-A-R-A-N-C-E-S

FOR PLAINTIFF:

MARK K. STRINGER, ESQ.
BLAKELOCK & STRINGER, P.A.
37 EAST CENTER, 2ND FLOOR
PROVO, UT 84606

FOR DEFENDANT:

LORIE FOWLKE, ESQ.
JEFFS & JEFFS
90 NORTH 100 EAST
PROVO, UT 84606

I-N-D-E-X

E-X-H-I-B-I-T-S

EXHIBIT # **PAGE ADMITTED**

NONE

THE COURT: If you feel prejudiced and you need more time then I'll require him to do that. Otherwise, I'll let him amend now and we'll proceed in the trial under the petition to modify the decree on the name change. That's your call.

MS. FOWLKE: I've spoke to my client regarding that. I, I think I wrote that in the memorandum just to clarify where I understood that we were procedurally. We do not have any objection on going ahead--

THE COURT: Do you waive that objection then?

MS. FOWLKE: -- rather than have him come back. I am, yes.

THE COURT: You will? All right.

MS. FOWLKE: My client is ready to proceed on the trial.

THE COURT: Mr. Stringer, you may amend your petition--

MR. STRINGER: Thank you, Your Honor.

THE COURT: -- to conform to the allegations for the evidence that you intend to present. We'll proceed under the Petition to Modify the decree to change the name. And,

therefore, you have the burden of proceeding.

MR. STRINGER: Thank you, Your Honor. A brief statement for the Court before we begin.

Principally our position was at the time of the last hearing that this name change had been appropriately done in the State of Colorado. However, we have found out since the last hearing that in the Colorado court that matter was never completed. Although service was completed, at the hearing on the motion no one appeared, inexplicably actually. And the Court waited then until last year, which was about a five year hiatus, to dismiss the matter on its own Order to Show Cause.

THE COURT: All right. Thank you.

MR. STRINGER: So that was never accomplish there. And so our basis for requesting the name change this morning is basically on the points enumerated in Hamby--

THE COURT: Uh-huh (indicating affirmatively).

MR. STRINGER: -- with regard to the child's sense of identity and, and her family circumstances.

THE COURT: Thank you. I've read both

(sic) birth you were married to the Defendant, Daniel Christensen?

A. Correct.

Q. All right. And he is the natural father?

A. Correct.

Q. Now, at what time did you, at what date do you recall separating from Mr. Christensen?

A. It would be January or February. Late January, 1988.

Q. Okay.

A. When Stephanie was just a few months old.

Q. So the child was a few months old?

A. Right.

Q. Okay. And then you were subsequently divorced in, at what time?

A. There was a nonprotunct order so it gets kind of confusing. But in 1989, July I think is when I had the hearing, so I think that's when they nonprotunct it back to.

Q. Okay. And since your separation in January of '88 has the child resided with you?

A. Correct.

Q. All right. Then you married Mr. Brubaker in October of '89?

A. Correct.

Q. And the child was about two at that time?
A. Just, yes, she turned two in July.
Q. Thank you.
A. So a little over two.
Q. Now since the, the time of your marriage to Mr. Brubaker to the present has the child resided with you and Mr. Brubaker?
A. Correct.
Q. Okay. Have there been any other children born to your relationship with Mr. Brubaker?
A. Yes, Chad Michael Brubaker born July 12th, 1990. Natural child of Joe and myself.
Q. All right. And he bears the last name of?
A. Brubaker.
Q. Okay. Now, in or about July of '91 did you take an action to change the name of your daughter to Brubaker?
A. That's correct.
Q. Okay. Did you hire counsel to do that?
A. That is correct.
Q. Did you pay her a fee to do that?
A. Yes, I paid her in advance.
Q. What did you pay her?
A. $250.

Q. All right. And to the best of your knowledge--

THE COURT: What year was this? Did you say '91?

THE WITNESS: Uh-huh (indicating affirmatively).

MR. STRINGER: Yes, Your Honor.

THE COURT: Thank you.

MR. STRINGER: '91. To the best of your knowledge did that petition get filed?

A. Yes. In fact, she sent a letter to me to give to the school to show that this had been done.

Q. Okay. And to the best of your knowledge the petition was granted in or about that time?

A. To the best of my knowledge.

Q. Okay. When did you first find out that the petition had not been granted?

A. This morning at 9:30.

Q. Okay. Now, back in the '91-'92 time frame did you therefore, thereafter change the name of your child to Brubaker?

A. Correct.

Q. Okay. And she has been going by that name since?

A. Correct.

Q. Is she registered in school that way?

A. She has been for, she's in 4th grade now and she has been for all grades including kindergarten.

Q. Okay. Is she registered in her church that way?

A. That is correct.

Q. Okay. And to the best of your knowledge is she known in all respects both legally and socially by that name?

A. That is correct.

Q. Okay. Now, at or about the time that the name change was taking place, that's the July, '91 time frame.

A. That's correct.

Q. Did you know where Mr. Christensen was?

A. We had reason to believe he was in, outside the Seattle area. But he was behind on his child support and the phone had been disconnected. We tried to have him served and the Sheriff wrote on there that he thought he was avoiding service.

Q. Okay. Had you been receiving regular child support until then?

A. No, no. This was, you'll notice by some

of the actions it was really past due. And when we did receive, or if we, when we did receive anything it was based on a Springville bank account. So it was really hard to tell.

Q. Okay. And had he been arranging for visitation between the child's birth and that July, '91 time frame?

A. A few times he would but he was evasive about it. He would say maybe I'll be there, maybe I won't. At one time we went to the airport to pick him up and he did not show. Some other times he'd say maybe I'll be there, maybe I won't. But he would never come exactly when he said he was going to. Because we had, at one point we had some, someone there to serve him on a, on a different matter than this and, but he didn't show. He came like a day later.

Q. Okay. Now the July, '91 makes the child essentially four years old at that time. During that time, from birth to age four --

A. Correct.

Q. -- how many visitations would you say Mr. Bru-- Mr. Christensen had?

A. Over six. I don't know. When I lived here in, in Utah sometimes I would bring her down.

But when I hired on with the Federal Government in '89 he came once to Oklahoma, so that would be one. And then in Col-- When I moved to Colorado I know my husband and I came out here once and brought her but he had requested that visitation to be cut short.

Q. Okay. How many days total do you recall that those five or six visits would have accumulated?

A. No more than a month total. And that's being very generous.

Q. Okay. Has he remained current on his child support since that time?

A. No. I have to bring actions.

Q. Okay. And you, and you have obtained judgments for unpaid child support?

A. That is correct.

Q. When do you recall was the first date on which Mr. Christensen was made aware of the child using the name Brubaker?

A. Okay. It would have been-- She'd pretty much called herself that from when Joe and I met. And so he would have known about it, I know he specifically said something about it when she was in kindergarten and--

Q. What year would that have been?

A. The '91 time frame.

Q. '91-'92?

A. Yeah.

Q. Uh-huh (indicating affirmatively)?

A. Somewhere in there he had said something about it and said I understand that Joe will be, that Joe is her dad and I accept it, that type of a statement. And so I know he knew about it at least at the very latest '91.

Q. Uh-huh (indicating affirmatively). Did you ever send him or do you know if he ever obtained any school records that would have the name Brubaker on them?

A. I don't, I don't know.

Q. Do you know if she ever sent him a letter indic-- and signing it, or a card, with the name Brubaker?

A. Their contact is so minimal I couldn't say for sure. She would know.

Q. Okay.

A. She'd prob-- They don't communicate that often so I don't know if it would have, if she would have.

Q. Okay. But you recall in the '91-'92 time

frame that you let him know.

A. Well, he said that Stephanie was with him and he wanted her to go by Christensen and she refused.

Q. Okay. So you discussed it at that time?

A. Yes.

Q. Now to the best of your knowledge has he brought any action before this action to get the name enforced as Christensen?

A. Not to my knowledge.

Q. Okay. Do you know whether there became a time when he became aware of the Colorado action?

A. I would assume so since--

Q. But you don't know?

A. I, I can't say for sure because this has been so long ago. But he's made statements about it so I would assume such.

Q. What has he said about it?

A. That--

MS. FOWLKE: Objection. Could I have some foundation when?

THE COURT: Sustained.

MR. STRINGER: When, when did you discuss with him the fact of the Colorado action?

THE WITNESS: Most recently in our last

visit here at the courthouse.

Q. Okay. But before that?

A. I can't say for sure.

Q. Okay. Now over the last, let's see, since the July '91-'92 time frame has Mr. Christensen's visitation habits increased, decreased, remained the same?

A. Pretty much the same, once or twice a year visitation.

Q. Okay. And about how many days per year would you recall that that accumulated?

A. Two or three weeks a year at the most. Again, sometimes it would just be for a weekend. But just recently within the last few years he's been doing a little bit longer. Now that she's older and more independent he takes her for a little bit longer.

Q. Okay. How does Stephanie refer to Mr. Brubaker?

A. Dad.

Q. How long has that been going on?

A. Since July of '89 when I first met him.

Q. Why did you take the action in '91 to change her name legally from Christensen to Brubaker?

A. Because Chad was born and they would be going to school together and it was important to keep the children's identities the same in that regard. She had, she called herself Brubaker and it was my desire to make it legal.

Q. How does, excuse me. How does Stephanie refer to Mr. Christensen?

A. Sweety Pie.

Q. Okay. She developed that on her own?

A. Yes. That's what we all call him including my son. That's just something that she started calling him when he resumed visitation.

Q. Is Stephanie aware that there is some discussion concerning chang--, changing her name back to Christensen?

A. She is aware. She listened in on a conversation between Joseph and myself.

Q. Do you know whether she's addressed that to her dad?

A. To--

Q. To Mr. Christensen?

A. I am not aware of-- She might have said something, I don't know.

Q. Okay. What is your feeling about her reaction to the possibility?

A. She will not be very pleased. She, she comes at this kind of-- At first she's just like please don't make them change my name because I don't know how to spell it and I don't know how to write it. And she worried about what the other kids in school will think. And since--

MS. FOWLKE: I think I'm going to object. I think it's getting into some--

THE COURT: Sustained.

MS. FOWLKE: -- pretty big hearsay.

THE COURT: Sustained.

MR. STRINGER: Yes. Just answer my question --

THE WITNESS: Okay.

Q. -- with regard to what is your perception of how she feels about getting her name changed back.

A. She does not want to and she's pretty strong about it.

Q. Okay. No further direct, Your Honor.

CROSS EXAMINATION BY MS. FOWLKE.

MS. FOWLKE: Isn't it correct that you've asked Mr. Christensen on at least one or more occasions that you'd like to have Joseph adopt this child?

A. That is true.

Q. And what has been his response?

A. No. No, actually we've said you're so far behind in your child support and you're complaining about the judgments, if you'd prefer Joe would be more than willing to adopt and then that gets rid of the child support obligation.

Q. And his response was still no?

A. Yeah.

Q. Always?

A. Yes.

Q. When you filed this petition for the name change and you also indicated that you wanted service by publication because you didn't know where he was--

A. No. We attempted service regularly. The Sheriff had some serv-- There was a, a Sheriff in, the name of the County up there had attempted to serve.

Q. Okay. If you'll just answer my question. Can I approach the witness, please?

THE COURT: You may.

MS. FOWLKE: This is a petition.

MR. STRINGER: Yes.

MS. FOWLKE: Could you please identify

that document for the Court?

A. Okay. This is the one that the, my attorney had put before the court after they had tried to serve him.

Q. And can you read paragraph #4?

A. "The Petitioner desires a change of name because the marriage of the minor child's natural parents, Pattie and, and Daniel, was dissolved by Order of the District Court in and for the State of Utah.

The minor child is in custody of the natural mother and guardian who has remarried and whose name now is Pattie S. Brubaker.

The minors child, minor child's natural father, Daniel R. Christensen, cannot be located. He has failed to pay child support since the time of the divorce and efforts to locate him and collect such child support have been unsuccessful. His last known residence was in Pearce County, State of Washington. A copy of the return of service--"

This is the one where the return of service--

Q. Uh-huh (indicating affirmatively).

A. -- that said that they couldn't find him.

"Is attached hereto to **EXHIBIT A**".

I don't know if you've got the exhibit but you'll see the Sheriff's handwritten on there thinking that he's avoiding service.

Q. So this petition was written by your attorney, I assume, Ms. Renthrow?

A. Ms. Renthrow. Correct.

Q. And pursuant to your direction?

A. Over the phone, yes.

Q. And so you told Ms. Renthrow that you were unable to locate the natural father and you had--

A. Yes. We had just gotten that service--

Q. Uh-huh (indicating affirmatively).

A. -- that said that they could not find him.

Q. Right.

A. And so I said I am not sure that that's where he is but I believe him to be in Pearce County.

Q. And this was in 1991, 1992, in that area?

A. Somewhere in there. Again, this has been

Q. And did you ever consider contacting, having your counsel contact him in order to be in touch with him?

A. Well, no. Dean Ellis doesn't usually-- Any times that we've contacted him for anything he's been less than receptive to comply.

Q. You didn't ask your attorney to contact Mr. Ellis regarding this petition?

A. Regarding this, the name change matter?

Q. Uh-huh (indicating affirmatively).

A. No.

Q. Okay.

A. We did not.

Q. You never checked back with Ms. Renthrow to see if an order had been filed in this matter or, or concluded?

A. When I talked to her she was going to the courthouse on this matter. I was employed at the Federal Government, sensitive position, could not be released. The Court was aware of that--

Q. Uh-huh (indicating affirmatively).

A. -- to my knowledge.

Q. So you never followed up with Ms. Renthrow on whether the order had been filed?

A. Because she sent me that piece of paper

for the school and the school accepted it and everyone--

Q. Right.

A. -- and the insurance (inaudible, two speakers).

Q. But this is a petition. Do you understand the difference between a petition and an order?

A. Not at that time I did not.

Q. Do you now?

A. At this time I probably do.

Q. Isn't it true that in 1992 the Order was finally provided on Mr. Christensen's Petition for Modification and the child support was reduced?

A. I'll have to take your word for that. I don't have anything in front of me but that's--

Q. Do you recall that an Order of child--

A. When he got his child support reduced down?

Q. Right. That Order on his Petition to Modify--

A. I remember that.

Q. -- it was about and do you recall it being in about 1992 when the Order finally was released?

A. I recall sometimes the Defendant didn't show up for some of them.

Q. If you'd answer my question. Do you recall that some of the continuances had anything to do with the fact that the correct amounts of child support or whatever figures were involved had to be calculated?

A. I think the most recent one was that was part of the concern.

Q. Okay. You, you talked about registering your child at school. Hasn't your child gone to home school a good deal of the time?

A. Two years worth of her schooling was home school.

Q. When was that?

A. Second and third.

Q. Second and third grade?

A. Right. So kindergarten and first were public school. Second and third were home school.

Q. And kindergarten and first, was that in Colorado?

A. Yes, that was in Colorado.

Q. And where was the home school?

A. In--

Q. Where were you living at that time in home school?

A. I was living in Florida.

Q. Florida?

A. The pu-- The school is actually-- She's technically not home school because it is an official school, Christian Liberty Academy--

Q. Uh-huh (indicating affirmatively).

A. -- outside of Chicago, Illinois. And she is just treated as a satellite student.

Q. And you taught her at home?

A. Correct. They would send me the materials.

Q. For second and third grade. And fourth grade was when you moved here?

A. Correct.

Q. Okay. Thank you. I don't think I have anything else. I don't think I have (inaudible, whispering).

MR. STRINGER: Redirect if you please, Your Honor.

REDIRECT EXAMINATION BY MR. STRINGER.

Q. At the time that you filed the Petition and the Motion for Alternative Service in the Colorado matter back in July of '91, did Mr. Ellis

who was the attorney for your ex-husband in Utah, did he ever tell you that he was authorized to accept service or process?

A. No.

Q. Did you believe that you could accu--, you could validly serve a Utah attorney for a Colorado matter?

A. I was not aware of such a thing.

Q. Okay. Now you have, you have gotten over the course of the, of the post-divorce matters more than one judgment for back child support against Mr. Christensen. Is that correct?

A. Correct, right.

Q. And those have totalled variously two or three thousand dollars apiece; haven't they?

A. That's correct.

Q. Has he ever voluntarily paid one?

A. Of those?

Q. Yes.

A. No, no. They've all-- He didn't pay them and a lien was put on some property which he sold and the title insurance people, the title guys called me and told me it was there and it eventually came to me.

Q. Okay. Thank you.

Q. Okay. And over what number of months? Would you recall that?

A. That litigation it seemed like it was between one and two years so...

Q. Okay. So let's say an 18 month period or so --

A. Could be, yeah.

Q. -- you had four or five visitations. For how many days total?

A. Oh probably, if it was four visitations say, each one probably was three days apiece average. So 12 days.

Q. Okay. Then from the time of the divorce until now --

A. Uh-huh (indicating affirmatively).

Q. -- how many visitations have you averaged during the course of a calendar year?

A. Three.

Q. And what has been the accumulation of time on the average for those three visits during a calendar year?

A. Oh. They're different. Some of them are one, I don't know, maybe not as low as one but maybe two or three days. The longest I've had was about a month.

Q. Uh-huh (indicating affirmatively). Now, when do you recall first becoming aware that your daughter was using the name of Brubaker?

A. Well I, I knew that when she was learning to write about when she was either three or four years old. When I had visitation with her we would be practicing writing and she would be practicing writing the name Brubaker as her last name, Stephanie Brubaker. I said, how come you're using that last name? Well, Mommy told me to. I said well that's not your last name.

MR. STRINGER: Move to strike, Your Honor. That's hearsay.

THE COURT: Overruled. You asked him the question how he knew that. He's being responsive to the question.

MR. STRINGER: No. I asked him the question when he first became aware. Not how he knew.

THE COURT: I don't recall except-- Do you have any objection or any comments?

MS. FOWLKE: I think it's the same question that was asked to her. I mean I can, I can ask it.

THE COURT: I'll, I'll strike his last

answer and allow you to rephrase it.

MR. STRINGER: Thank you. Now, that would have been age three or four you think?

A. What would have been age three or four?

Q. When you first became aware she was using the name Brubaker.

A. Well, just because I saw her practicing the name Brubaker, I didn't know she was officially calling herself or her mother officially calling herself that.

Q. Okay. But you knew that she was at least using it some, in some form?

A. I knew she was trying to learn to spell that--

Q. Okay.

A. -- instead of her real last name.

Q. All right. When did you become aware that she was using that name other than just trying to spell it?

A. I don't know. Probably sometime between then and now.

Q. Okay.

A. I never had her officially use any name. I mean, I don't have her enrolled in school or anything where I call her a certain name. So

anything I hear is just more or less hearsay either from her or from her, her mother.

Q. Well let's, let's get to the discussions with her mother. You've heard her mother testify that she had a discussion with you concerning this name change and that you were made aware that she was using the name Brubaker as her last name. Do you recall that testimony?

A. Yes.

Q. Okay. Are you saying now that conversation never took place?

A. You mean a week ago when we were in court here?

Q. No, I mean--

A. That's when it took place.

Q. -- back several years ago.

A. No, not several years ago. A week ago, the first time I heard she had ever petitioned any court for any name change.

Q. Not petitioning. Just that the child was using the name in school or church or in family.

A. I knew she was using it in her family because her mother was teaching her to write that name.

Q. All right. So when do you recall having

known that first?

A. When she was learning to write --

Q. All right. That's the age--

A. -- between three and four years old.

Q. -- three or four event we talked about. Okay. Now, since that-- That would have been in '90 or '91 if she was age three or four.

Now, since that time there have been actions in this matter before the court. In April of '91--

A. Uh-huh (indicating affirmatively).

Q. -- did you bring up the concerns about the name change then?

A. Oh, yes I did.

Q. You brought it to the Court's attention?

A. Oh, yes and it's written in one of the court documents.

Q. What is written?

A. And you were her lawyer too--

Q. In 19--

A. -- so you should have seen that.

Q. -- '91?

A. I don't remember. It's been one of the previous times we've been to court when Dean Ellis was my lawyer. I can go dig it out of, of the--

Q. Okay. And what is your recollection of the Court's Order at that time?

A. They didn't make any Order of it.

Q. Okay. So it was brought to the Court's attention but no Order resulted?

A. No.

Q. All right. Now, did you through Mr. Ellis or on your own bring to the Court's attention at that time that they missed the issue of the name change?

A. As far as missing the issue, I don't, I don't know. We didn't-- No, I don't think it was, it wasn't anything heard or judged upon that issue.

Q. Okay. And you didn't file a pleading asking the Court to enforce a name of Christensen at that time?

MS. FOWLKE: I think it's asked and answered, Your Honor.

THE COURT: Sustained. It is.

MR. STRINGER: Okay. How about in August of '92 there was a modification made. Did you raise the issue of the name being enforced at that time?

A. I believe that may have been the time.

Q. Okay. But there was no Order that issued from there?

A. That's the time I just talked to you about.

Q. Okay. And so there was no--

A. So I told you everything I know about that time.

Q. All right. So that was, that was the August '92 modification, not the April '91 matter?

A. I'm not positive but I believe that's the time.

Q. Okay. Now in August '93 there was another period, piece of litigation concerning visitation issues and the child. Did you raise the name change at that time?

A. I'm not sure.

Q. But you don't recall having filed a petition?

A. No.

Q. Or a motion of any kind?

A. No.

MS. FOWLKE: Your Honor, if he could clarify for the witness what Order he's talking about. I think it's unrealistic to expect him to know by a date three years ago what Order he's

talking about with the history of this case.

THE COURT: Is that objection as to foundation?

MS. FOWLKE: Yes, Your Honor.

THE COURT: Sustained.

MR. STRINGER: Okay. Let's see, you're the one that addressed the Order initially. You showed it to Pattie. Yes, that's it.

There was an Order issued 18 August, 1993. There's an Order on an Order to Show Cause brought by your, your attorney for you. Did you at that time bring an action before the court on the name, enforcement of the name Christensen?

A. I don't know.

Q. You don't recall having done it?

A. All I can tell you is at least once in some of the Orders we've filed I brought it up written in the legal documents that we've filed with the courts. And I don't know what it was called and I don't know, exactly know when it was. But I know at least once. It's in one of those papers.

Q. Okay.

A. I've read it.

Q. Again, in the May and June time frame of

1994 there was an Order to Show Cause before this judge in this court concerning child support matters. Do you recall that?

A. I guess, yeah.

Q. Well, do you recall having a judgment entered against you for $3996.62?

A. When?

Q. In May and June of '94.

A. Was that when I had that money in escrow?

Q. That was where the money, that judgment was used to re--, to restrict the money in escrow, yes.

A. I believe it was all during that time of the same deal is when he, he brought it up.

Q. Okay. At that time do you recall having filed anything to enforce the name?

MS. FOWLKE: Your Honor, objection. Asked and answered again.

MR. STRINGER: Well, I didn't ask him about June, '94 yet.

THE COURT: Overruled.

MS. FOWLKE: He's--

THE COURT: Overruled. I don't believe he did.

THE WITNESS: A, I didn't,-- I

don't know. I mean if, if I knew that she had officially supposedly changed her name I would have been filing one every week. But I didn't so I brought it up when I could. And there was a lot of other stuff in those documents that were, seemed to take precedence with whoever was arguing. They seemed to didn't care about that too much.

MR. STRINGER: Are you current on your child support right now?

A. Yes.

Q. Wasn't there just a stipulated agreement for $3,000 in child support arrearages?

A. Yes.

Q. Have you paid that?

A. No.

Q. Well then, then you're not current, are you.

A. I guess not if that's part of my child support.

Q. Okay. Well, let me make sure I understand. Are you saying that your understanding of that judgment is that it is not for child support?

A. I don't know exactly what it's for. There's a lot of stuff in there that seems like,

location.

Q. Uh-huh (indicating affirmatively).

A. Same area. Salt Lake or--

Q. Have you ever talked to Stephanie about that?

A. No. Well, maybe, yeah. I've, I've said that, pretty much that same thing to her. I've said, you know, I wish we, we lived closer so we could see each other better.

Q. Okay.

A. But I didn't like ask her if she wanted to move.

Q. Okay.

A. I, I--

Q. No, that's not what I asking.

A. Okay.

Q. Thanks. Mr. Stringer was asking you regarding when you first knew that Stephanie had any affiliation with the name of Brubaker and you described her writing this name for you.

A. Yes.

Q. Did you talk to her about why she was writing her name that way?

A. Yes.

Q. And how did you know what she was writing,

Q. And did Mrs. Brubaker ever say anything to you about that?

A. No.

Q. Has that ever been an issue?

A. No.

Q. Have you ever given your permission to Mrs. Brubaker to change this child's name?

A. No.

Q. Have you ever had a discussion with her regarding her use of that name?

A. Yes.

Q. What-- Do you remember that conversation?

A. Well, I remember mainly the one we had here two weeks ago when we were here in court. That's the main one that I really remember.

Q. Anything prior to that?

A. Yeah. I, I've mentioned to her on the phone, I said stuff like, you know, she shouldn't be using that name and all the, you know. Yeah I, I've mentioned things to her before.

Q. And what, and what did you tell her about it? Was it okay? Did you tell her it's okay?

A. I said no, it's not okay. And she would, you know, she'd say that's too bad, I can tell her--.

shouldn't be telling her he's her father.

Q. Do you recall specifically telling Mrs. Brubaker that she should not use the name Brubaker for Stephanie?

A. Yes.

Q. And how long ago?

A. I think I've told her-- I don't know.

Q. On more than one occasion?

A. Off and on. You know, I tell her, I bring it up at certain times when we--.

Q. On more than one occasion?

A. I think so, yes.

Q. Did you have any notice or have any awareness of this pending action in Colorado?

A. No.

Q. Had you moved prior to that action?

A. No.

Q. Prior to the time they claimed they tried to affect service?

A. No. The only thing I can think of is I lived in an apartment building. I moved from apartment number seven to apartment number nine, next door.

Q. Uh-huh (indicating affirmatively).

A. And I changed, my phone number changed at

Q. Days early.

A. I don't, I don't recall that.

Q. Okay. What's the name by which your parents are known, the last name?

A. Truman.

Q. So they don't share your last name?

A. No. Well, my father has my last name.

Q. You, are you concerned about your child's schooling and medical and all of that?

A. Yes.

Q. Have you ever requested her school records?

A. No.

Q. Have you ever requested her medical records?

A. No.

Q. Have you ever requested her church records?

A. No.

Q. Are you aware of whether or not she's active in a church?

A. Yes.

Q. What church?

A. LDS.

Q. Does she share that with you?

If you could clarify that for the Court.

A. My mother, my mother's last name is Truman because she's married to a man named Truman. Stephanie called him Grandpa too.

Q. Uh-huh (indicating affirmatively).

A. And my mother, Grandma.

Q. And you're--

A. My real father is, last name is Christensen. He lives in St. George so she doesn't see him very often. She's saw him just a couple of times.

Q. Does she know him as Grandfather?

A. Yes.

Q. And just a follow-up on his reference to the strength of the bond between you and Stephanie. Is that bond what you would like it to be?

A. I'd like it to be closer.

Q. Is there anything you feel like you could do to make that closer?

A. Yeah. Part of it I'm doing it right now.

Q. Anything else?

A. Fight for visitation when it's, when it's ordered.

Q. Do you have any reasons to believe that,

why the bond is not as close as you would like? Have there been any--

A. The distance between us. The difficulty in visitation because of that distance.

Q. Okay. That's all I have. Thank you.

THE COURT: You may step down.

THE WITNESS: Thanks.

THE COURT: All right. Any other witnesses?

MR. STRINGER: Yes, Your Honor. I'd like to call Joseph Brubaker. And I would like to recall Pattie Brubaker for a very short rebuttal to the testimony.

THE COURT: All right. I'm going to recess until 1:30. I've kept this very efficient, patient court staff into the night and over the lunch and after court on the last three cases and I don't intend to do it today so--

MS. FOWLKE: Your Honor--

THE COURT: We're going to recess until 1:30 and then I'll allow you to continue to present any evidence you'd like.

MR. STRINGER: All right, Your Honor.

MS. FOWLKE: Could I just let the Court be aware that my client has a 3:30 plane to catch

WHEREUPON,

PATTIE SUZANNE CHRISTENSEN BRUBAKER

having been previously placed under oath by the clerk of the court and sworn to testify truthfully in this matter, retook the stand and upon examination testified as follows:

DIRECT EXAMINATION BY MR. STRINGER.

MR. STRINGER: To the best of your recollection have you received from Mr. Brubaker, or from Mr. Christensen the Court Order amount of child support every month?

A. No, I have not.

Q. All right.

A. And the check date and the receival date are sometimes up to (inaudible, two speakers {4 to 5? 45?}) days.

Q. But even, even putting aside the dates, has the amount been the Court Ordered amount every month?

A. No. Months get missed.

Q. All right. On the matter of the school, medical and church records that I asked him about, has he ever asked you for any of those records?

A. No.

Q. On the matter of the church baptism, when

was your daughter baptized?

A. She was baptized August, it was a Saturday so it would be August I think 4th of this past year, 1995.

Q. Of '95? Where?

A. In Sandy, Utah.

Q. Okay. And did you notify or, or do you know whether or not Mr. Christensen was aware of that baptismal date?

A. I know he was aware of the baptism, yes.

Q. Okay.

A. Stephanie told him and I was there.

Q. And did he come?

A. No.

Q. Oh, last summer's visitation, did Mr. Christensen keep Stephanie for the full amount of the visitation?

A. No.

Q. What happened?

A. Stephanie called me and said she would like to come home and he brought her home.

Q. Okay. About how much early did he bring her home?

A. Well, he only had her for three days. I don't know how long he'd planned on having her

because he didn't say.

Q. Okay. How long could he have had her?

A. The rest of the entire month at, at the very least.

Q. Okay. No further on rebuttal, Your Honor.

THE COURT: All right.

CROSS EXAMINATION BY MS. FOWLKE.

MS. FOWLKE: You did not notify Mr. Christensen regarding the baptism; is that correct?

A. Stephanie told him.

Q. Is it correct that you did not notify him?

A. Personally me?

Q. Uh-huh (indicating affirmatively)?

A. No, because she did.

Q. How do you know she did?

A. Because I was there.

Q. Stephanie notified him in your presence?

A. Yes, over the phone. She, I think he must have asked her was she getting baptized because she told him about the baptism.

Q. Do you typically rely on Stephanie to relay information that you feel is important?

A. No. But if she already does it then I

you?

A. Dad, Daddy.

Q. And during the time that she has been living with you have you participated in her schooling or school conferences?

A. Yes.

Q. Okay. And have you participated in her medical care?

A. Yes. I've provided for it totally.

Q. Okay. And if she has needed medical care have you gone with her on occasion?

A. Yes.

Q. And as far as her church involvement, she is a member of the Church of Jesus Christ of Latter-Day Saints. Is that correct?

A. That is correct.

Q. Are you also a member?

A. Yes, I am.

Q. And is, to the best of your knowledge is Pattie a member?

A. Yes, she is.

Q. And do you guys attend church regularly?

A. Yes, we do.

Q. And do you take Stephanie with you?

A. Yes, she does.

Q. And do you participate with Stephanie in parent-child or father-daughter kinds of things at that church?

A. Yes, I do.

Q. Okay. Now Stephanie, Stephanie was baptized in August of '95. Is that correct?

A. Correct.

Q. And who baptized her?

A. I did.

Q. Okay. And under what name was she baptized?

A. Stephanie Brubaker.

Q. Under what name is she known at school?

A. Stephanie Brubaker.

Q. And under what name is her medical care and medical records listed?

A. Stephanie Brubaker.

Q. Okay. Now you also have a son?

A. Yes.

Q. And your son was born when?

A. July 12th, 1990.

Q. Put you on the hot seat, didn't I.

A. Yes, you did.

Q. I understand that. We're all dads.

Now, since that time to the best of your

ability to observe, has Stephanie exhibited a sibling relationship with Chad?

A. They're extremely close.

Q. Okay. And Chad goes by the last name of Brubaker?

A. Yes, he does.

Q. Okay. What is your feeling about Stephanie?

A. That she is my daughter and I treat her as such. I treat her equally as I do Chad and I love her the same. Chad is my son.

Q. No further direct questions, Your Honor.

MS. FOWLKE: I have no questions.

THE COURT: No cross?

MS. FOWLKE: No.

THE COURT: You may step down. Thank you.

MR. STRINGER: That's all we have, Your Honor.

THE COURT: All right. Anything further from either party?

MS. FOWLKE: We could do closing argument but I think you know what we'd have to say. I don't know that we have anything new.

THE COURT: I'm going to ask you both to

Counsel's approved the form of that Order. We'd like to submit that to the Court now.

THE COURT: All right, you may.

MR. STRINGER: Thank you.

THE COURT: Now you've marked some prior court pleadings as **EXHIBIT A** and **B**. They're part of the record anyway--

MS. FOWLKE: I think those were, the exhibits are part of the-- They were exhibits as part of the trial brief, Your Honor.

THE COURT: All right. They're part of the record--

MS. FOWLKE: And they are part--

MR. STRINGER: They're already part of the record.

MS. FOWLKE: They are part of the record obviously.

THE COURT: Part of the documents.

MR. STRINGER: They were never offered for--

MS. FOWLKE: Yeah.

MR. STRINGER: -- evidence at the time but--

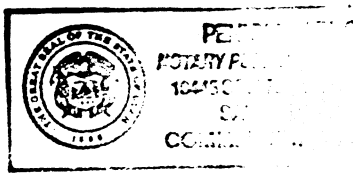
THE COURT: She never offered them. She marked them as part of her trial brief.

REPORTER'S CERTIFICATION

STATE OF UTAH)
) SS.
COUNTY OF UTAH)

I, Penny C. Abbott, a Certified Shorthand Reporter and Notary Public in and for the State of Utah, do hereby certify that I received the electronically recorded tapes #967016, #967017, #967018 in the matter of CHRISTENSEN VS. CHRISTENSEN and that I transcribed them into typewriting, and that a full, true and correct transcription of said hearing so recorded and transcribed is set forth in the foregoing pages numbered 1 through 105, inclusive and that said pages constitute an accurate and complete transcript of all the testimony and proceedings adduced at the proceedings and contained on the tapes except where it is indicated that the tape recording was inaudible.

WITNESS my hand and official seal this 27th day of June, 1996.



PENNY C. ABBOTT, CSR.
LICENSE 22-102811-7801
Notary Public, Comm Exp 9-24-96

PENNY C. ABBOTT, CSR

ADDENDUM F
SELECTED STATUTES AND RULES

long as the entire Christmas holiday is equally divided;

(h) Father's Day shall be spent with the natural or adoptive father every year beginning at 9 a.m. until 7 p.m. on the holiday;

(i) Mother's Day shall be spent with the natural or adoptive mother every year beginning at 9 a.m. until 7 p.m. on the holiday;

(j) extended visitation with the noncustodial parent may be:

(i) up to four weeks consecutive at the option of the noncustodial parent;

(ii) two weeks shall be uninterrupted time for the noncustodial parent; and

(iii) the remaining two weeks shall be subject to visitation for the custodial parent consistent with these guidelines;

(k) the custodial parent shall have an identical two week period of uninterrupted time during the children's summer vacation from school for purposes of vacation;

(l) if the child is enrolled in year-round school, the noncustodial parent's extended visitation shall be ½ of the vacation time for year-round school breaks, provided the custodial parent has holiday and phone visits;

(m) notification of extended visitation or vacation weeks with the child shall be provided at least 30 days in advance to the other parent; and

(n) telephone contact shall be at reasonable hours. 1993

30-3-36. Special circumstances.

(1) When visitation has not taken place for an extended period of time and the child lacks an appropriate bond with the noncustodial parent, both parents shall consider the possible adverse effects upon the child and gradually reintroduce an appropriate visitation plan for the noncustodial parent.

(2) For emergency purposes, whenever the child travels with either parent, all of the following will be provided to the other parent:

(a) an itinerary of travel dates;

(b) destinations;

(c) places where the child or traveling parent can be reached; and

(d) the name and telephone number of an available third person who would be knowledgeable of the child's location.

(3) Unchaperoned travel of a child under the age of five years is not recommended. 1993

30-3-37. Relocation.

(1) When either parent decides to move from the state of Utah or 150 miles or more from the residence specified in the court's decree, that parent shall provide reasonable advance written notice of the intended relocation to the other parent.

(2) The court may, upon motion of any party or upon the court's own motion, schedule a hearing with notice to review the visitation schedule as provided in Section 30-3-35 and make appropriate orders regarding the visitation and costs for visitation transportation.

(3) In determining the visitation schedule and allocating the transportation costs, the court shall consider:

(a) the reason for the parent's relocation;

(b) the additional costs or difficulty to both parents in exercising visitation;

(c) the economic resources of both parents; and

(d) other factors the court considers necessary and relevant.

(4) Upon the motion of any party, the court may order the parent intending to move to pay the costs of transportation for:

(a) at least one visit per year with the other parent; and

(b) any number of additional visits as determined equitable by the court.

(5) Upon the motion of any party, the court may order uninterrupted visitation with the noncustodial parent for a minimum of 30 days during extended visitation, except if the court finds it is not in the best interests of the child. 1993

30-3-38. Pilot Program for Expedited Visitation Enforcement.

(1) There is established an Expedited Visitation Enforcement Pilot Program in the third judicial district to be administered by the Administrative Office of the Courts from July 1, 1996, to July 1, 1997.

(2) This pilot program is to resolve visitation problems on an expedited basis by enabling a parent who alleges that his court-ordered visitation rights have been violated to file a request for enforcement of the order, have a conference scheduled with the other parent and a private mediator to address visitation issues within 15 days of filing the request, and have the private mediator assess the situation, facilitate an agreement on visitation between the parties, and make an appropriate recommendation to the court on a timely basis. Within 15 days, an agreement on visitation shall become a temporary order under the signature of the court.

(3) The Judicial Council shall make rules to implement and administer this pilot program.

(4) The parties to a proceeding initiated in the third district court to enforce the terms of a visitation order shall participate in this pilot program, unless one of the parties:

(a) makes an allegation of child sexual abuse implicating the other party, in which case, the mediator shall refer the matter to the court and report the allegation to the Division of Family Services consistent with Title 62A, Chapter 4a, Part 4, Child Abuse or Neglect Reporting Requirements; or

(b) is unwilling to participate in the program, in which case, the matter shall be referred to the court.

(5) The Administrative Office of the Courts shall adopt a program to evaluate the effectiveness of this pilot program. Progress reports shall be provided to the Judiciary Interim Committee in August 1996 and as requested thereafter by the committee. At least once during this pilot program, the Administrative Office of the Courts shall present to the committee the results of a survey that measures the effectiveness of the program in terms of increased compliance with visitation orders and the responses of interested persons.

(6) (a) The Department of Human Services shall apply for federal funds designated for visitation, if such funds are available. The department shall contract any federal funds received under this application to the Administrative Office of the Courts for the administration of this pilot program.

(b) This pilot program shall be funded through funds received under Subsection (a), the Children's Legal Defense Account as established in Section 63-63a-8, or other available funding. Without funding, the pilot program may not proceed. 1996

CHAPTER 4

SEPARATE MAINTENANCE

Section

the child is participating or being honored, and the noncustodial parent shall be entitled to attend and participate fully;

(11) the noncustodial parent shall have access directly to all school reports including preschool and daycare reports and medical records and shall be notified immediately by the custodial parent in the event of a medical emergency;

(12) each parent shall provide the other with his current address and telephone number within 24 hours of any change;

(13) each parent shall permit and encourage liberal telephone contact during reasonable hours and uncensored mail privileges with the child;

(14) parental care shall be presumed to be better care for the child than surrogate care and the court shall encourage the parties to cooperate in allowing the noncustodial parent, if willing and able, to provide child care;

(15) each parent shall provide all surrogate care providers with the name, current address, and telephone number of the other parent and shall provide the noncustodial parent with the name, current address, and telephone number of all surrogate care providers unless the court for good cause orders otherwise; and

(16) each parent shall be entitled to an equal division of major religious holidays celebrated by the parents, and the parent who celebrates a religious holiday that the other parent does not celebrate shall have the right to be together with the child on the religious holiday. 1993

30-3-34. Best interests — Rebuttable presumption.

(1) If the parties are unable to agree on a visitation schedule, the court may establish a visitation schedule consistent with the best interests of the child.

(2) The advisory guildelines as provided in Section 30-3-33 and the visitation schedule as provided in Section 30-3-35 shall be presumed to be in the best interests of the child. The visitation schedule shall be considered the minimum visitation to which the noncustodial parent and the child shall be entitled unless a parent can establish otherwise by a preponderance of the evidence. The presumption may be rebutted based upon a finding of the court including any of the following criteria:

(a) visitation would endanger the child's physical health;

(b) visitation would significantly impair the child's emotional development;

(c) a substantiated allegation of child abuse exists;

(d) the lack of demonstrated parenting skills;

(e) the financial inability of the noncustodial parent to provide adequate food and shelter for the child during periods of visitation;

(f) the preference of the child if the court determines *the child to be of sufficient maturity;*

(g) the incarceration of the noncustodial parent in a county jail, secure youth corrections facility, or an adult corrections facility; and

(h) any other criteria the court determines relevant to the best interests of the child.

(3) Once the visitation schedule has been established, the parties may not alter the schedule except by mutual consent of the parties or a court order. 1993

30-3-35. Minimum schedule for visitation.

(1) The visitation schedule shall apply to school-age children, ages 5-18, beginning with kindergarten.

(2) If the parties do not agree to a visitation schedule, the following schedule shall be considered the minimum visitation to which the noncustodial parent and the child shall be entitled:

(a) one weekday evening to be specified by the noncustodial parent or the court from 5:30 p.m. until 8:30 p.m;

(b) alternating weekends beginning on the first weekend after the entry of the decree from 6 p.m. on Friday until 7 p.m. on Sunday continuing each year;

(c) *holidays take precedence over the weekend visita*tion, and changes shall not be made to the regular rotation of the alternating weekend visitation schedule;

(d) if a holiday falls on a regularly scheduled school day, the noncustodial parent shall be responsible for the child's attendance at school for that school day;

(e) if a holiday falls on a weekend or on a Friday or Monday and the total holiday period extends beyond that time so that the child is free from school and the parent is free from work, the noncustodial parent shall be entitled to this lengthier holiday period;

(f) in years ending in an odd number, the noncustodial parent is entitled to the following holidays:

(i) child's birthday on the day before or after the actual birthdate beginning at 3 p.m. until 9 p.m.; at the discretion of the noncustodial parent, he may take other siblings along for the birthday;

(ii) Human Rights Day beginning 6 p.m. the day before the holiday until 7 p.m. on the holiday;

(iii) Easter holiday beginning at 6 p.m. on Friday until Sunday at 7 p.m., unless the holiday extends for a lengthier period of time to which the noncustodial parent is completely entitled;

(iv) Memorial Day beginning 6 p.m. on Friday until Monday at 7 p.m., unless the holiday extends for a lengthier period of time to which the noncustodial parent is completely entitled;

(v) July 24th beginning 6 p.m. on the day before the holiday until 11 p.m. on the holiday;

(vi) Veteran's Day holiday beginning 6 p.m. the day before the holiday until 7 p.m. on the holiday; and

(vii) the first portion of the Christmas school vacation as defined in Subsection 30-3-32(3)(b) plus Christmas Eve and Christmas Day until 1 p.m., so long as the entire holiday is equally divided;

(g) in years ending in an even number, the noncustodial parent is entitled to the following holidays:

(i) child's birthday on actual birthdate beginning at 3 p.m. until 9 p.m.; at the discretion of the noncustodial parent, he may take other siblings along for the birthday;

(ii) New Year's Day beginning at 6 p.m. the day before the holiday until 7 p.m. on the holiday;

(iii) President's Day beginning at 6 p.m. the day before the holiday until 7 p.m. on the holiday;

(iv) July 4th beginning at 6 p.m. the day before the holiday until 11 p.m. on the holiday;

(v) Labor Day beginning at 6 p.m. on Friday until Monday at 7 p.m. unless the holiday extends for a lengthier period of time to which the noncustodial parent is completely entitled;

(vi) the fall school break, if applicable, commonly known as U.E.A. weekend beginning at 6 p.m. on Wednesday until Sunday at 7 p.m. unless the holiday extends for a lengthier period of time to which the noncustodial parent is completely entitled;

(vii) Columbus Day beginning at 6 p.m. the day before the holiday until 7 p.m. on the holiday;

(viii) Thanksgiving holiday beginning Wednesday at 7 p.m. until Sunday at 7 p.m; and

(ix) the second portion of the Christmas school vacation as defined in Subsection 30-3-32(3)(b) plus Christmas day beginning at 1 p.m. until 9 p.m., so

submitted to the court. Any reviewing attorney or guardian ad litem shall certify in writing that he has reviewed the agreement and shall comment on the agreement based on the best interests of the child or children.

(2) The court may approve or reject the mediation agreement based on the best interests of the child or children. The court shall state its reasons for rejecting all or any part of the mediation agreement. If the court approves the mediated agreement, its terms shall be incorporated in the court's final order.

(3) (a) If after mediation under this section the parties do not reach agreement on child custody or visitation, the mediator shall notify the court of that result.

(b) The court shall, if appropriate, refer the matter for a legal custody or visitation evaluation. If the parties come to agreement on legal custody or visitation after the matter has been referred for an evaluation, the study shall be terminated.

(c) The parties may return to mediation at any time before any trial or final hearing on permanent legal custody or visitation.

(4) Every final order implementing a mediated agreement shall contain:

(a) a provision for child support; and

(b) a statement that each parent shall have access to records and information pertaining to a minor child, including medical, dental, and school records, whether or not the child resides with the parent, unless that access is found by the court not to be in the best interest of the child or that access is found by the court to be sought for the purpose of causing detriment to the other parent. If access to the records under this subsection is not ordered, the court shall state in the order its reasons for denying that access.

(5) The court may not apply a preference for one parent over the other in determining parental rights and responsibilities because of the parent's gender or the child's age or gender. 1992

30-3-30. Appropriation to pilot program to cover costs of impecunious parties.

Each party who is unable to pay the costs of mediation may attend mediation without payment upon a prima facie showing of impecuniosity as evidenced by an affidavit of impecuniosity filed in the district court. In those instances, the independent contractor shall be reimbursed for its costs from the appropriations for the "Domestic Relations Mandatory Mediation Pilot Program." Before a decree of divorce shall be entered, the court shall make a final review and determination of impecuniosity and may order the payment of the costs if so determined. 1992

30-3-31. Review of pilot program.

(1) The Administrative Office of the Courts shall adopt a program to evaluate the effectiveness of the mandatory mediation pilot program. Progress reports shall be provided semi-annually on the date of implementation of this section and on the results beginning July 1, 1994. The results shall be reported to the Judiciary Interim Committee on a bi-annual basis.

(2) The Administrative Office of the Courts may make recommendations to the Judiciary Interim Committee on methods to make the program fiscally solvent, if necessary, including the increase in marriage license fees, divorce filing fees, or mediation fees. 1992

30-3-32. Visitation — Intent — Policy — Definitions.

(1) It is the intent of the Legislature to promote visitation at a level consistent with all parties' interests.

(2) Absent a showing by a preponderance of evidence of real harm or substantiated potential harm to the child:

(a) it is in the best interests of the child of divorcing, divorced, or adjudicated parents to have frequent, meaningful, and continuing access to each parent following separation or divorce;

(b) each divorcing, separating, or adjudicated parent is entitled to and responsible for frequent, meaningful, and continuing access with his child consistent with the child's best interests; and

(c) it is in the best interests of the child to have both parents actively involved in parenting the child.

(3) For purposes of Sections 30-3-32 through 30-3-37:

(a) "Child" means the child or children of divorcing, separating, or adjudicated parents.

(b) "Christmas school vacation" means the time period beginning on the evening the child gets out of school for the Christmas school break until the evening before the child returns to school, except for Christmas Eve, Christmas Day, and New Year's Day.

(c) "Extended visitation" means a period of visitation other than a weekend, holiday as provided in Subsections 30-3-35(2)(f) and (2)(g), religious holidays as provided in Subsections 30-3-33(4) and (16), and "Christmas school vacation." 1993

30-3-33. Advisory guidelines.

In addition to the visitation schedule provided in Section 30-3-35, advisory guidelines are suggested to govern all visitation arrangements between parents. These advisory guidelines include:

(1) visitation schedules mutually agreed upon by both parents are preferable to a court-imposed solution;

(2) the visitation schedule shall be utilized to maximize the continuity and stability of the child's life;

(3) the court may alter this schedule to make shorter visits of greater frequency or other arrangements consistent with the child's best interests for children under age 5; otherwise the visitation schedule as provided in Section 30-3-35 shall apply;

(4) special consideration shall be given by each parent to make the child available to attend family functions including funerals, weddings, family reunions, religious holidays, important ceremonies, and other significant events in the life of the child or in the life of either parent which may inadvertently conflict with the visitation schedule;

(5) the noncustodial parent shall pick up the child at the times specified and return the child at the times specified, and the child's regular school hours shall not be interrupted;

(6) the custodial parent shall have the child ready for visitation at the time he is to be picked up and shall be present at the custodial home or shall make reasonable alternate arrangements to receive the child at the time he is returned;

(7) the court may make alterations in the visitation schedule to reasonably accommodate the work schedule of both parents and may increase the visitation allowed to the noncustodial parent but shall not diminish the standardized visitation provided in Section 30-3-35;

(8) the court may make alterations in the visitation schedule to reasonably accommodate the distance between the parties and the expense of exercising visitation;

(9) neither visitation nor child support is to be withheld due to either parent's failure to comply with a court-ordered visitation schedule;

(10) the custodial parent shall notify the noncustodial parent within 24 hours of receiving notice of all significant school, social, sports, and community functions in which

(3) If the mediator determines at the initial session that continued mediation is inappropriate and so informs the court in writing, the court may hold a trial of or a final hearing on permanent legal custody or visitation.

(4) Not sooner that 45 days after the initial mediation session is held, the court may, on its own motion or on motion by one of the parties, consider whether a continued stay of any trial or final hearing on permanent legal custody or visitation is warranted pending the outcome of mediation. In making this determination, the court shall consider, but need not follow, the opinion of the mediator. If the court concludes that a further stay of proceedings is not warranted, it may proceed to final resolution of the matter. 1992

30-3-24. Mediation and compliance with requirement.

(1) (a) Following the initial mediation session, the parties shall participate in at least one additional mediation session. Participation in these two mediation sessions shall constitute compliance with the mandatory mediation requirement imposed by this chapter even if a mediated agreement may not have been reached.

(b) Upon completion of the mediation process and the reaching of an agreement, or upon completion of the two required sessions without reaching an agreement, the mediator shall certify in writing to the court:

(i) the process followed was the one prescribed by law;

(ii) the agreement reached, if any, and presented to the attorney reflects the actual results of the mediation process; and

(iii) the mediator used his best efforts to effect a settlement of the custody or visitation dispute.

(2) The written certification by the mediator shall constitute evidence of compliance by the parties with the mandatory mediation requirement. Upon receipt of evidence of compliance, the district court may then proceed with a trial or final hearing on permanent legal custody or visitation. 1992

30-3-25. Prohibited issues in mediation.

Any issue relating to property division may be considered during the mediation unless:

(1) the property division issue is unrelated to the legal custody or visitation issue; and

(2) the parties agree in writing not to consider the property division issue as part of their mediation. 1992

30-3-26. Creation of mandatory mediation program — Duties of director — Courts.

(1) There is created in the Administrative Office of the Courts a mandatory mediation program. The Administrative Office of the Courts shall designate the director of mandatory mediation services in the fourth judicial district under the pilot program.

(2) The director of the mandatory mediation program shall have the following qualifications and duties and is subject to approval by the Judicial Council. The director shall:

(a) meet the qualifications as provided in Section 30-3-27; and

(b) supervise mediation and evaluate the quality of any such mediation or study.

(3) The Administrative Office of the Courts shall:

(a) contract with the mediators to perform mediation, who meet the qualifications of Section 30-3-27, arrange and monitor mediator training, and assign and monitor case load;

(b) contract under Subsection (3) with a person or public or private entity to perform mediation pursuant to Title 63, Chapter 56, Utah Procurement Code; and

(c) administer and manage the appropriations for "Domestic Relations Mandatory Mediation Pilot Program" as provided in Section 30-3-30 in the judicial districts where the pilot program occurs.

(4) The Judicial Council shall adopt rules:

(a) to implement this mediation pilot program;

(b) to compile and maintain a list of qualified mediators; and

(c) to respond to requests for a change of mediators. 1992

30-3-27. Mediator qualifications.

A mediator who performs mandatory mediation in contested child custody or visitation matters under Sections 30-3-10 through 30-3-10.6 or Section 30-4-3 shall have the following minimum qualifications:

(1) (a) a license to engage in the practice of psychology under Title 58, Chapter 25a, Psychologists' Licensing Act, an advanced degree in psychology from an accredited institution of higher education, or a license in social work, under Title 58, Chapter 35, or a license in marriage and family therapy, under Title 58, Chapter 39, and successfully completed not less than 40 hours of mediation training; or

(b) a license to practice law in the state of Utah and successfully completed not less than 40 hours of mediation training;

(2) (a) knowledge of the court system and the procedures used in contested child custody or visitation matters;

(b) knowledge of resources in the community to which the parties to contested child custody or visitation matters can be referred for assistance; and

(c) knowledge of child development, clinical issues relating to children, the effects of divorce on children, and child custody research. 1992

30-3-28. Mediation proceedings closed — Information confidential — Records closed.

(1) All mandatory mediation proceedings under Sections 30-3-23 and 30-3-24 shall be held in private, and all persons other than mediation services personnel, the parties, their counsel, and children of the parties shall be excluded unless the parties agree otherwise.

(2) All communications, verbal or written, made in mediation proceedings are confidential. A party or any other individual present during mediation proceedings may not be examined in any civil or criminal action as to such communications and such communications may not be used in any civil or criminal action without the consent of the parties to the mediation.

(3) All records of the court with respect to mediation proceedings shall be classified private and disclosed only pursuant to Section 63-2-202.

(4) (a) However, a person providing mediation is subject to the child abuse reporting requirements of Section 62A-4a-403 and the criminal penalty for failure to report under Section 62A-4a-411. The confidentiality provisions of Section 62A-4a-412 apply to reports made under this subsection.

(b) If the mediator determines a participant in the procedure has made an immediate threat of physical violence against a readily identifiable victim or against the mediator, communications involving the threat are not confidential. 1994

30-3-29. Mediation agreement — Order.

(1) Any agreement which resolves issues of permanent legal custody or visitation between the parties reached as a result of mediation under this section shall be prepared in writing, reviewed by the attorney for each party and by any appointed guardian ad litem for the child, if any, and then

specialists or scientific expert, or the pastor, bishop or presiding officer of any religious denomination to which the parties may belong. The power and jurisdiction granted by this act shall be in addition to that presently exercised by the district courts and shall not be in limitation thereof. 1969

30-3-17.1. Proceedings deemed confidential — Written evaluation by counselor.

The petition for conciliation and all communications, verbal or written, from the parties to the domestic relations counselors or other personnel of the conciliation department in counseling or conciliation proceedings shall be deemed to be made in official confidence within the meaning of Section 78-24-8 and shall not be admissible or usable for any purpose in any divorce hearing or other proceeding. However, the marriage counselor may submit to the appropriate court a written evaluation of the prospects or prognosis of a particular marriage without divulging facts or revealing confidential disclosures. 1969

30-3-18. Waiting period for hearing after filing for divorce — Exemption — Use of counseling and education services not to be construed as condonation or promotion.

(1) Unless the court, for good cause shown and set forth in the findings, otherwise orders, no hearing for decree of divorce shall be held by the court until 90 days shall have elapsed from the filing of the complaint, provided the court may make such interim orders as may be just and equitable.

(2) The 90-day period as provided in Subsection (1) shall not apply in any case where both parties have completed the mandatory educational course for divorcing parents as provided in Section 30-3-11.3 or the mediation requirement as provided in Section 30-3-21.

(3) The use of counseling, mediation, and education services provided under this chapter may not be construed as condoning the acts that may constitute grounds for divorce on the part of either spouse nor of promoting divorce. 1993

30-3-19. Purpose.

The Legislature declares as public policy that encouraging mediated resolutions of disputes over child custody or visitation between parents is in the best interests of children. 1992

30-3-20. Definitions.

As used in Sections 30-3-20 through 30-3-31:

(1) "Court" means the district court of the fourth judicial district which participates in the mandatory mediation pilot program.

(2) "Mediation" means a cooperative process by which the parties are assisted in formulating an agreement by a mediator who applies communication and dispute resolution skills to resolve a dispute concerning child custody or visitation that arises from a domestic relations matter with the best interest of the child as the paramount consideration.

(3) "Mediator" means a person with special skills and training in domestic relations dispute resolution as established in Section 30-3-27.

(4) "Pilot program" means a mandatory mediation program designed to implement divorce mediation where issues of child custody or visitation are in dispute established in Section 30-3-30. 1992

30-3-21. When referral to mediation is required.

(1) (a) There is established a mandatory mediation pilot program in the fourth judicial district to be administered by the Administrative Office of the Courts after January 1, 1993, and before March 1, 1995. The pilot program may be expanded to include the third judicial district after July 1, 1993.

(b) The Judicial Council shall adopt rules to implement and administer this pilot program.

(2) If it appears to the court on the face of the complaint or at any time during the divorce proceedings prior to the entry of the initial divorce decree that issues of custody or visitation of a child or children are contested, the court shall refer the matter for mediation of the contested issues prior to or concurrent with the setting of the matter for hearing.

(3) This pilot program shall not include petitions for modification of an existing divorce decree.

(4) (a) At the initial appearance, the court shall determine whether:

(i) either or both issues of child custody and visitation are in dispute; and

(ii) the attitudes of the parties and the nature of the dispute are amenable to successful mediation.

(b) The court may direct the parties to mediation and still make necessary interim orders including protective orders under Section 30-3-5.5, ex parte protective orders or protective orders under Title 30, Chapter 6, temporary orders under Title 30, Chapter 4, nunc pro tunc orders under Section 30-4a-1, and appointment of a guardian ad litem under Title 78, Chapter 3a.

(5) The mediation proceeding shall be used to reduce acrimony between the parties, to avoid litigation, and to develop an agreement assuring the child's or children's close and continuing contact with both parents after the marriage is dissolved. 1992

30-3-22. Waiver of mandatory mediation requirement.

(1) The parties shall attend the mediation unless one party objects and the district court finds that attendance at a mediation session would cause undue hardship to or threaten the mental or physical health or safety of either of the parties or the child or children of the parties.

(2) In making its determination of whether attendance at the mediation session would endanger the health or safety of either of the parties or the child or children the court shall consider evidence of any of the following:

(a) that a party has engaged in abuse of the child or children;

(b) that a party has engaged or been victimized in interspousal domestic violence;

(c) that a party has a significant problem with alcohol or drug abuse; or

(d) any other evidence indicates that a party's or his child's or children's health or safety will be endangered by attending the session.

(3) In making its determination of whether attendance at the mediation session would cause undue hardship to either of the parties or the child or children of the parties, the court shall consider evidence of any of the following:

(a) that a party is mentally ill or is incompetent;

(b) that a party cannot complete mediation due to military service or extraordinary job requirements; or

(c) any other evidence indicates that a party or his child or children will face undue hardship by attending the session. 1992

30-3-23. Initial mediation session.

(1) The initial mediation session shall inform the parties about mediation, evaluate whether mediation is appropriate, and determine whether both parties are willing to participate in mediation in good faith.

(2) If the mediator determines at the initial session that continued mediation is appropriate and makes a written recommendation to the court, the court shall not hold a trial or a final hearing on permanent legal custody or visitation until after mediation is completed or terminated under Subsection (4).

division the district court judge or judges may, and in each county having a population of more than 300,000 and in which the district court has established a family court division the district court judges shall, by an order filed in the office of the clerk on or before July 1 of each year, appoint one or more domestic relations counselors, an attorney of recognized ability and standing at the bar as family court commissioner, and such other persons as assistants and clerks as may be necessary, to serve during the pleasure of the appointing power.

1969

30-3-15.2. Repealed. 1992

30-3-15.3. Commissioners — Powers.

Commissioners shall:

(1) secure compliance with court orders;

(2) require completion of mandatory mediation as provided in Sections 30-3-21 and 30-3-24;

(3) require attendance at the mandatory course as provided in Section 30-3-11.3;

(4) serve as judge pro tempore, master or referee on:

(a) assignment of the court; and

(b) with the written consent of the parties:

(i) orders to show cause where no contempt is alleged;

(ii) default divorces where the parties have had marriage counseling but there has been no reconciliation;

(iii) uncontested actions under the Uniform Act on Paternity;

(iv) actions under the Uniform Civil Liability for Support Act; and

(v) actions under the Reciprocal Enforcement of Support Act; and

(5) represent the interest of children in divorce or annulment actions, and the parties in appropriate cases.

1992

30-3-15.4. Salaries and expenses.

Salaries of persons appointed under the foregoing sections shall be fixed by the county legislative body of the county in which they serve. Office space, furnishings, equipment, and supplies for family court commissioners and conciliation staff shall be provided by the county. The expenses and salaries of family court commissioners and conciliation staff shall be paid from county funds. 1996

30-3-16. Repealed. 1961

30-3-16.1. Jurisdiction of family court division — Powers.

Whenever any controversy exists between spouses which may, unless a reconciliation is achieved, result in the dissolution or annulment of the marriage or in the disruption of the household, and there is a child of the spouses or either of them under the age of 17 years whose welfare might be affected, the family court division of the district court shall have jurisdiction over the controversy, over the parties and over all persons having any relation to the controversy and may compel attendance before the court or a domestic relations counselor of the parties or other persons related to the controversy. The court may make orders in divorce or conciliation proceeding as it deems necessary for the protection of the family interests.

1969

30-3-16.2. Petition for conciliation.

Prior to the filing of any action for divorce, annulment, or separate maintenance, either spouse or both spouses may file a petition for conciliation in the family court division invoking the jurisdiction of the court for the purpose of preserving the marriage by effecting a reconciliation between the parties or an amicable settlement of the controversy between them so as to avoid litigation over the issues involved. 1969

30-3-16.3. Contents of petition.

The petition for conciliation shall state:

(1) A controversy exists between the spouses and request the aid of the court to effect a reconciliation or an amicable settlement of the controversy.

(2) The name and age of each child under the age of 17 years whose welfare may be affected by the controversy.

(3) The name and address of the petitioner or the names and addresses of the petitioners.

(4) If the petition is filed by one spouse only, the name and address of the other spouse as a respondent.

(5) The name, as a respondent, of any other person who has any relation to the controversy and, if known to the petitioners, the address of such person.

(6) Such other information as the court may by rule require. 1969

30-3-16.4. Procedure upon filing of petition.

When a petition for conciliation is filed in the family court division of the district court, the court shall refer the matter to the domestic relations counselor or counselors and shall cause notice to be given to the spouses, by mail or in a form prescribed by the court, of the filing of the petition and of the time and place of any hearing, conference or other proceeding scheduled by the court or domestic relations counselors under this act. 1969

30-3-16.5. Fees.

The court may fix fees to be charged for filing a petition for conciliation and for use of the courts' counseling services.

1969

30-3-16.6. Information not available to public.

Neither the names of petitioners nor respondents, nor the contents of petitions for conciliation filed under this act, shall be available or open to public inquiry, except that an attorney for a person seeking to file an action for divorce, annulment or separate maintenance may determine from the clerk of the court if the other spouse has filed a petition for conciliation.

1969

30-3-16.7. Effect of petition — Pendency of action.

The filing of a petition for conciliation under this act shall, for a period of 60 days thereafter, act as a bar to the filing by either spouse of an action for divorce, annulment of marriage or separate maintenance unless the court otherwise orders. The pendency of an action for divorce, annulment of marriage or separate maintenance shall not prevent either party to the action from filing a petition for conciliation under this act, either on his own or at the request and direction of the court as authorized by Section 30-3-17; and the filing of a petition for conciliation shall stay for a period of 60 days, unless the court otherwise orders, any trial or default hearing upon the complaint. However, when the judge of the family court division is advised in writing by a marriage counselor to whom a petition for conciliation has been referred that a reconciliation of the parties cannot be effected, the bar to filing an action or the stay of trial or default hearing shall be removed. 1969

30-3-17. Power and jurisdiction of judge.

The judge of a district court may counsel either spouse or both and may in his discretion require one or both of them to appear before him and, in those counties where a domestic relations counselor has been appointed pursuant to this act, require them to file a petition for conciliation and to appear before such counselor, or may recommend the aid of a physician, psychiatrist, psychologist, social service worker or other

States, the District of Columbia, and the Commonwealth of Puerto Rico.

(4) The judgment provided for in Subsection (1)(a), to be effective and enforceable as a lien against the real property interest of any third party relying on the public record, shall be docketed in the district court in accordance with Sections 78-22-1 and 62A-11-311. 1989

30-3-11. Repealed. 1961

30-3-11.1. Family Court Act — Purpose.

It is the public policy of the state of Utah to strengthen the family life foundation of our society and reduce the social and economic costs to the state resulting from broken homes and to take reasonable measures to preserve marriages, particularly where minor children are involved. The purposes of this act are to protect the rights of children and to promote the public welfare by preserving and protecting family life and the institution of matrimony by providing the courts with further assistance for family counseling, the reconciliation of spouses and the amicable settlement of domestic and family controversies. 1969

30-3-11.2. Appointment of counsel for child.

If, in any action before any court of this state involving the custody or support of a child, it shall appear in the best interests of the child to have a separate exposition of the issues and personal representation for the child, the court may appoint counsel to represent the child throughout the action, and the attorney's fee for such representation may be taxed as a cost of the action. 1969

30-3-11.3. Mandatory educational course for divorcing parents — Purpose — Curriculum — Exceptions.

(1) There is established a mandatory course for divorcing parents as a pilot program in the third and fourth judicial districts to be administered by the Administrative Office of the Courts from July 1, 1992, to June 30, 1994. On July 1, 1994, an approved course shall be implemented in all judicial districts. The mandatory course is designed to educate and sensitize divorcing parties to their children's needs both during and after the divorce process.

(2) The Judicial Council shall adopt rules to implement and administer this program.

(3) As a prerequisite to receiving a divorce decree, both parties are required to attend a mandatory course on their children's needs after filing a complaint for divorce and receiving a docket number, unless waived under Section 30-3-4. If that requirement is waived, the court may permit the divorce action to proceed.

(4) The mandatory course shall instruct both parties about divorce and its impacts on:

(a) their child or children;

(b) their family relationship; and

(c) their financial responsibilities for their child or children.

(5) The Administrative Office of the Courts shall administer the course pursuant to Title 63, Chapter 56, Utah Procurement Code, through private or public contracts and organize the program in each of Utah's judicial districts. The contracts shall provide for the recoupment of administrative expenses through the costs charged to individual parties, pursuant to Subsection (7).

(6) A certificate of completion constitutes evidence to the court of course completion by the parties.

(7) (a) Each party shall pay the costs of the course to the independent contractor providing the course at the time and place of the course. A fee of $8 shall be collected, as part of the course fee paid by each participant, and deposited in the Children's Legal Defense Account, described in Section 63-63a-8.

(b) Each party who is unable to pay the costs of the course may attend the course without payment upon a prima facie showing of impecuniosity as evidenced by an affidavit of impecuniosity filed in the district court. In those situations, the independent contractor shall be reimbursed for its costs from the appropriation to the Administrative Office of the Courts for "Mandatory Educational Course for Divorcing Parents Program." Before a decree of divorce may be entered, the court shall make a final review and determination of impecuniosity and may order the payment of the costs if so determined.

(8) Appropriations from the General Fund to the Administrative Office of the Courts for the "Mandatory Educational Course for Divorcing Parents Program" shall be used to pay the costs of an indigent parent who makes a showing as provided in Subsection (7)(b).

(9) The Administrative Office of the Courts shall adopt a program to evaluate the effectiveness of the mandatory educational course. Progress reports shall be provided annually to the Judiciary Interim Committee. 1994

30-3-12. Courts to exercise family counseling powers.

Each district court of the respective judicial districts, while sitting in matters of divorce, annulment, separate maintenance, child custody, alimony and support in connection therewith, child custody in habeas corpus proceedings, and adoptions, shall exercise the family counseling powers conferred by this act. 1969

30-3-13. Repealed. 1961

30-3-13.1. Establishment of family court division of district court.

A family court division of the district court may be established with the consent of the county legislative body in a county in which the district court determines that the social conditions in the county and the number of domestic relations cases in the courts require use of the procedures provided for in this act in order to give full and proper consideration to such cases and to effectuate the purposes of this act. The determination shall be made annually by the judge of the district court in counties having only one judge, and by a majority of the judges of the district court in counties having more than one judge. 1993

30-3-14. Repealed. 1961

30-3-14.1. Designation of judges — Terms.

In a county within a judicial district having more than one judge of the district court but having a population of less than 300,000 and in which the district court has established a family court division, the presiding judge of such court shall annually, in the month of September, designate at least one judge to hear all cases under this act. In a county within a judicial district having more than one judge of the district court and having a population of more than 300,000 and in which the district court has established a family court division, the presiding judge of such court shall annually, in the month of September, designate at least two judges to hear all cases under this act, and shall designate one of such judges as the presiding judge of such family court division. Such judge or judges shall serve on the family court division not less than one year and devote their time primarily to divorce and other domestic relations cases. 1969

30-3-15. Repealed. 1961

30-3-15.1. Appointment of domestic relations counselors, family court commissioner, and assistants and clerks.

In each county having a population of less than 300,000 and in which the district court has established a family court

(a) both parents agree to an order of joint legal custody; or

(b) both parents appear capable of implementing joint legal custody.

(2) In determining whether the best interest of a child will be served by ordering joint custody, the court shall consider the following factors:

(a) whether the physical, psychological, and emotional needs and development of the child will benefit from joint legal custody;

(b) the ability of the parents to give first priority to the welfare of the child and reach shared decisions in the child's best interest;

(c) whether each parent is capable of encouraging and accepting a positive relationship between the child and the other parent;

(d) whether both parents participated in raising the child before the divorce;

(e) the geographical proximity of the homes of the parents;

(f) the preference of the child if the child is of sufficient age and capacity to reason so as to form an intelligent preference as to joint legal custody;

(g) the maturity of the parents and their willingness and ability to protect the child from conflict that may arise between the parents; and

(h) any other factors the court finds relevant.

(3) The determination of the best interest of the child shall be by a preponderance of the evidence.

(4) The court shall inform both parties that an order for joint custody may preclude eligibility for public assistance in the form of aid to families with dependent children, and that if public assistance is required for the support of children of the parties at any time subsequent to an order of joint legal custody, the order may be terminated under Section 30-3-10.4.

(5) The court may order that where possible the parties attempt to settle future disputes by a dispute resolution method before seeking enforcement or modification of the terms and conditions of the order of joint legal custody through litigation, except in emergency situations requiring ex parte orders to protect the child. **1990**

30-3-10.3. Terms of joint legal custody order.

(1) Unless the court orders otherwise, before a final order of joint legal custody is entered both parties shall attend the mandatory course for divorcing parents, as provided in Section 30-3-11.3, and present a certificate of completion from the course to the court.

(2) An order of joint legal custody shall provide terms the court determines appropriate, which may include specifying:

(a) either the county of residence of the child, until altered by further order of the court, or the custodian who has the sole legal right to determine the residence of the child;

(b) that the parents shall exchange information concerning the health, education, and welfare of the child, and where possible, confer before making decisions concerning any of these areas;

(c) the rights and duties of each parent regarding the child's present and future physical care, support, and education;

(d) provisions to minimize disruption of the child's attendance at school and other activities, his daily routine, and his association with friends; and

(e) as necessary, the remaining parental rights, privileges, duties, and powers to be exercised by the parents solely, concurrently, or jointly.

(3) The court shall, where possible, include in the order the terms agreed to between the parties.

(4) Any parental rights not specifically addressed by the court order may be exercised by the parent having physical custody of the child the majority of the time.

(5) (a) The appointment of joint legal custodians does not impair or limit the authority of the court to order support of the child, including payments by one custodian to the other.

(b) An order of joint legal custody, in itself, is not grounds for modifying a support order.

(c) The agreement may contain a dispute resolution procedure the parties agree to use before seeking enforcement or modification of the terms and conditions of the order of joint legal custody through litigation, except in emergency situations requiring ex parte orders to protect the child. **1994**

30-3-10.4. Modification or termination of order.

(1) On the motion of one or both of the joint legal custodians the court may, after a hearing, modify an order that established joint legal custody if:

(a) the circumstances of the child or one or both custodians have materially and substantially changed since the entry of the order to be modified, or the order has become unworkable or inappropriate under existing circumstances; and

(b) a modification of the terms and conditions of the decree would be an improvement for and in the best interest of the child.

(2) The order of joint legal custody shall be terminated by order of the court if both parents file a motion for termination. At the time of entry of an order terminating joint legal custody, the court shall enter an order of sole legal custody under Section 30-3-10. All related issues, including visitation and child support, shall also be determined and ordered by the court.

(3) If the court finds that an action under this section is filed or answered frivolously and in a manner designed to harass the other party, the court shall assess attorney's fees as costs against the offending party. **1990**

30-3-10.5. Payments of support, maintenance, and alimony.

Unless the order or decree providing for support, maintenance, or alimony under this chapter or Title 30, Chapter 4, provides a different time for payment, all monthly payments of support, maintenance, or alimony provided for in the order or decree shall be due one-half by the 5th day of each month, and the remaining one-half by the 20th day of that month. **1985**

30-3-10.6. Payment under child support order — Judgment.

(1) Each payment or installment of child or spousal support under any child support order, as defined by Subsection 62A-11-401(3), is, on and after the date it is due:

(a) a judgment with the same attributes and effect of any judgment of a district court, except as provided in Subsection (2);

(b) entitled, as a judgment, to full faith and credit in this and in any other jurisdiction; and

(c) not subject to retroactive modification by this or any other jurisdiction, except as provided in Subsection (2).

(2) A child or spousal support payment under a child support order may be modified with respect to any period during which a petition for modification is pending, but only from the date notice of that petition was given to the obligee, if the obligor is the petitioner, or to the obligor, if the obligee is the petitioner.

(3) For purposes of this section, "jurisdiction" means a state or political subdivision, a territory or possession of the United

(f) In determining alimony when a marriage of short duration dissolves, and no children have been conceived or born during the marriage, the court may consider restoring each party to the condition which existed at the time of the marriage.

(g) (i) The court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not forseeable at the time of the divorce.

(ii) The court may not modify alimony or issue a new order for alimony to address needs of the recipient that did not exist at the time the decree was entered, unless the court finds extenuating circumstances that justify that action.

(iii) In determining alimony, the income of any subsequent spouse of the payor may not be considered, except as provided in this subsection.

(A) The court may consider the subsequent spouse's financial ability to share living expenses.

(B) The court may consider the income of a subsequent spouse if the court finds that the payor's improper conduct justifies that consideration.

(h) Alimony may not be ordered for a duration longer than the number of years that the marriage existed unless, at any time prior to termination of alimony, the court finds extenuating circumstances that justify the payment of alimony for a longer period of time.

(8) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage of that former spouse. However, if the remarriage is annulled and found to be void ab initio, payment of alimony shall resume if the party paying alimony is made a party to the action of annulment and his rights are determined.

(9) Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is cohabitating with another person. 1995

30-3-5.1. Provision for income withholding in child support order.

Whenever a court enters an order for child support, it shall include in the order a provision for withholding income as a means of collecting child support as provided in Title 62A, Chapter 11, Part 4, Income Withholding. 1996

30-3-5.2. Allegations of child abuse or child sexual abuse — Investigation.

When, in any divorce proceeding or upon a request for modification of a divorce decree, an allegation of child abuse or child sexual abuse is made, implicating either party, the court shall order that an investigation be conducted by the Division of Child and Family Services within the Department of Human Services in accordance with Title 62A, Chapter 4a. A final award of custody or visitation may not be rendered until a report on that investigation is received by the court. That investigation shall be conducted by the Division of Child and Family Services within 30 days of the court's notice and request for an investigation. In reviewing this report, the court shall comply with Section 78-7-9. 1996

30-3-5.5, 30-3-6. Repealed. 1991, 1993

30-3-7. When decree becomes absolute.

(1) The decree of divorce becomes absolute:

(a) on the date it is signed by the court and entered by the clerk in the register of actions if both the parties who have a child or children have completed attendance at the mandatory course for divorcing parents as provided in Section 30-3-11.3 except if the court waives the requirement, on its own motion or on the motion of one of the parties, upon determination that course attendance and completion are not necessary, appropriate, feasible, or in the best interest of the parties;

(b) at the expiration of a period of time the court may specifically designate, unless an appeal or other proceedings for review are pending; or

(c) when the court, before the decree becomes absolute, for sufficient cause otherwise orders.

(2) The court, upon application or on its own motion for good cause shown, may waive, alter, or extend a designated period of time before the decree becomes absolute, but not to exceed six months from the signing and entry of the decree. 1994

30-3-8. Remarriage — When unlawful.

Neither party to a divorce proceeding which dissolves their marriage by decree may marry any person other than the spouse from whom the divorce was granted until it becomes absolute. If an appeal is taken, the divorce is not absolute until after affirmance of the decree. 1988

30-3-9. Repealed. 1969

30-3-10. Custody of children in case of separation or divorce — Custody consideration.

(1) If a husband and wife having minor children are separated, or their marriage is declared void or dissolved, the court shall make an order for the future care and custody of the minor children as it considers appropriate. In determining custody, the court shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties. The court may inquire of the children and take into consideration the children's desires regarding the future custody, but the expressed desires are not controlling and the court may determine the children's custody otherwise.

(2) In awarding custody, the court shall consider, among other factors the court finds relevant, which parent is most likely to act in the best interests of the child, including allowing the child frequent and continuing contact with the noncustodial parent as the court finds appropriate.

(3) If the court finds that one parent does not desire custody of the child, or has attempted to permanently relinquish custody to a third party, it shall take that evidence into consideration in determining whether to award custody to the other parent. 1993

30-3-10.1. Joint legal custody defined.

In this chapter, "joint legal custody":

(1) means the sharing of the rights, privileges, duties, and powers of a parent by both parents, where specified;

(2) may include an award of exclusive authority by the court to one parent to make specific decisions;

(3) does not affect the physical custody of the child except as specified in the order of joint legal custody;

(4) is not based on awarding equal or nearly equal periods of physical custody of and access to the child to each of the parents, as the best interest of the child often requires that a primary physical residence for the child be designated; and

(5) does not prohibit the court from specifying one parent as the primary caretaker and one home as the primary residence of the child. 1988

30-3-10.2. Joint legal custody order — Factors for court determination — Public assistance.

(1) The court may order joint legal custody if it determines that joint legal custody is in the best interest of the child and:

(c) If the plaintiff and the defendant have a child or children and the plaintiff has filed an action in the judicial district as defined in Section 78-1-2.1 where the pilot program shall be administered, a decree of divorce may not be granted until both parties have attended a mandatory course provided in Section 30-3-11.3 and have presented a certificate of course completion to the court. The court may waive this requirement, on its own motion or on the motion of one of the parties, if it determines course attendance and completion are not necessary, appropriate, feasible, or in the best interest of the parties.

(d) All hearings and trials for divorce shall be held before the court or the court commissioner as provided by Section 78-3-31 and rules of the Judicial Council. The court or the commissioner in all divorce cases shall enter the decree upon the evidence or, in the case of a decree after default of the defendant, upon the plaintiff's affidavit.

(2) The file, except the decree of divorce, may be sealed by order of the court upon the motion of either party. The sealed portion of the file is available to the public only upon an order of the court. The concerned parties, the attorneys of record or attorney filing a notice of appearance in the action, the Office of Recovery Services if a party to the proceedings has applied for or is receiving public assistance, or the court have full access to the entire record. This sealing does not apply to subsequent filings to enforce or amend the decree. 1995

30-3-4.1 to 30-3-4.4. Repealed. 1990

30-3-5. Disposition of property — Maintenance and health care of parties and children — Division of debts — Court to have continuing jurisdiction — Custody and visitation — Determination of alimony — Nonmeritorious petition for modification.

(1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties. The court shall include the following in every decree of divorce:

(a) an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children;

(b) if coverage is or becomes available at a reasonable cost, an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for the dependent children;

(c) pursuant to Section 15-4-6.5:

(i) an order specifying which party is responsible for the payment of joint debts, obligations, or liabilities of the parties contracted or incurred during marriage;

(ii) an order requiring the parties to notify respective creditors or obligees, regarding the court's division of debts, obligations, or liabilities and regarding the parties' separate, current addresses; and

(iii) provisions for the enforcement of these orders;

(d) provisions for income withholding in accordance with Title 62A, Chapter 11, Parts 4 and 5; and

(e) with regard to child support orders issued or modified on or after January 1, 1994, that are subject to income withholding, an order assessing against the obligor an additional $7 per month check processing fee to be included in the amount withheld and paid to the Office of Recovery Services within the Department of Human Services for the purposes of income withholding in accordance with Title 62A, Chapter 11, Parts 4 and 5.

(2) The court may include, in an order determining child support, an order assigning financial responsibility for all or a portion of child care expenses incurred on behalf of the dependent children, necessitated by the employment or training of the custodial parent. If the court determines that the circumstances are appropriate and that the dependent children would be adequately cared for, it may include an order allowing the noncustodial parent to provide child care for the dependent children, necessitated by the employment or training of the custodial parent.

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the custody of the children and their support, maintenance, health, and dental care, and for distribution of the property and obligations for debts as is reasonable and necessary.

(4) (a) In determining visitation rights of parents, grandparents, and other members of the immediate family, the court shall consider the best interest of the child.

(b) Upon a specific finding by the court of the need for peace officer enforcement, the court may include in an order establishing a visitation schedule a provision, among other things, authorizing any peace officer to enforce a court ordered visitation schedule entered under this chapter.

(5) If a petition for modification of child custody or visitation provisions of a court order is made and denied, the court shall order the petitioner to pay the reasonable attorneys' fees expended by the prevailing party in that action, if the court determines that the petition was without merit and not asserted or defended against in good faith.

(6) If a petition alleges substantial noncompliance with a visitation order by a parent, a grandparent, or other member of the immediate family pursuant to Section 78-32-12.2 where a visitation right has been previously granted by the court, the court may award to the prevailing party costs, including actual attorney fees and court costs incurred by the prevailing party because of the other party's failure to provide or exercise court-ordered visitation.

(7) (a) The court shall consider at least the following factors in determining alimony:

(i) the financial condition and needs of the recipient spouse;

(ii) the recipient's earning capacity or ability to produce income;

(iii) the ability of the payor spouse to provide support; and

(iv) the length of the marriage.

(b) The court may consider the fault of the parties in determining alimony.

(c) As a general rule, the court should look to the standard of living, existing at the time of separation, in determining alimony in accordance with Subsection (a). However, the court shall consider all relevant facts and equitable principles and may, in its discretion, base alimony on the standard of living that existed at the time of trial. In marriages of short duration, when no children have been conceived or born during the marriage, the court may consider the standard of living that existed at the time of the marriage.

(d) The court may, under appropriate circumstances, attempt to equalize the parties' respective standards of living.

(e) When a marriage of long duration dissolves on the threshold of a major change in the income of one of the spouses due to the collective efforts of both, that change shall be considered in dividing the marital property and in determining the amount of alimony. If one spouse's earning capacity has been greatly enhanced through the efforts of both spouses during the marriage, the court may make a compensating adjustment in dividing the marital property and awarding alimony.

30-3-1. Procedure — Residence — Grounds.

(1) Proceedings in divorce are commenced and conducted as provided by law for proceedings in civil causes, except as provided in this chapter.

(2) The court may decree a dissolution of the marriage contract between the plaintiff and defendant on the grounds specified in Subsection (3) in all cases where the plaintiff or defendant has been an actual and bona fide resident of this state and of the county where the action is brought, or if members of the armed forces of the United States who are not legal residents of this state, where the plaintiff has been stationed in this state under military orders, for three months next prior to the commencement of the action.

(3) Grounds for divorce:

(a) impotency of the defendant at the time of marriage;

(b) adultery committed by the defendant subsequent to marriage;

(c) willful desertion of the plaintiff by the defendant for more than one year;

(d) willful neglect of the defendant to provide for the plaintiff the common necessaries of life;

(e) habitual drunkenness of the defendant;

(f) conviction of the defendant for a felony;

(g) cruel treatment of the plaintiff by the defendant to the extent of causing bodily injury or great mental distress to the plaintiff;

(h) irreconcilable differences of the marriage;

(i) incurable insanity; or

(j) when the husband and wife have lived separately under a decree of separate maintenance of any state for three consecutive years without cohabitation.

(4) A decree of divorce granted under Subsection (3)(j) does not affect the liability of either party under any provision for separate maintenance previously granted.

(5) (a) A divorce may not be granted on the grounds of insanity unless: (i) the defendant has been adjudged insane by the appropriate authorities of this or another state prior to the commencement of the action; and (ii) the court finds by the testimony of competent witnesses that the insanity of the defendant is incurable.

(b) The court shall appoint for the defendant a guardian ad litem, who shall protect the interests of the defendant. A copy of the summons and complaint shall be served on the defendant in person or by publication, as provided by the laws of this state in other actions for divorce, or upon his guardian ad litem, and upon the county attorney for the county where the action is prosecuted.

(c) The county attorney shall investigate the merits of the case and if the defendant resides out of this state, take depositions as necessary, attend the proceedings, and make a defense as is just to protect the rights of the defendant and the interests of the state.

(d) In all actions the court and judge have jurisdiction over the payment of alimony, the distribution of property, and the custody and maintenance of minor children, as the courts and judges possess in other actions for divorce.

(e) The plaintiff or defendant may, if the defendant resides in this state, upon notice, have the defendant brought into the court at trial, or have an examination of the defendant by two or more competent physicians, to determine the mental condition of the defendant. For this purpose either party may have leave from the court to enter any asylum or institution where the defendant may be confined. The costs of court in this action shall be apportioned by the court. 1987

30-3-2. Right of husband to divorce.

The husband may in all cases obtain a divorce from his wife for the same causes and in the same manner as the wife may obtain a divorce from her husband. 1953

30-3-3. Award of costs, attorney and witness fees — Temporary alimony.

(1) In any action filed under Title 30, Chapter 3, 4, or 6, and in any action to establish an order of custody, visitation, child support, alimony, or division of property in a domestic case, the court may order a party to pay the costs, attorney fees, and witness fees, including expert witness fees, of the other party to enable the other party to prosecute or defend the action. The order may include provision for costs of the action.

(2) In any action to enforce an order of custody, visitation, child support, alimony, or division of property in a domestic case, the court may award costs and attorney fees upon determining that the party substantially prevailed upon the claim or defense. The court, in its discretion, may award no fees or limited fees against a party if the court finds the party is impecunious or enters in the record the reason for not awarding fees.

(3) In any action listed in Subsection (1), the court may order a party to provide money, during the pendency of the action, for the separate support and maintenance of the other party and of any children in the custody of the other party.

(4) Orders entered under this section prior to entry of the final order or judgment may be amended during the course of the action or in the final order or judgment. 1993

30-3-4. Pleadings — Findings — Decree — Use of affidavit — Sealing.

(1) (a) The complaint shall be in writing and signed by the plaintiff or plaintiff's attorney.

(b) A decree of divorce may not be granted upon default or otherwise except upon legal evidence taken in the cause. If the decree is to be entered upon the default of the defendant, evidence to support the decree may be submitted upon the affidavit of the plaintiff with the approval of the court.

30-2-3. Conveyances between husband and wife.

A conveyance, transfer or lien executed by either husband or wife to or in favor of the other shall be valid to the same extent as between other persons. 1953

30-2-4. Wife's right to wages — Actions for personal injury.

A wife may receive the wages for her personal labor, maintain an action therefor in her own name and hold the same in her own right, and may prosecute and defend all actions for the preservation and protection of her rights and property as if unmarried. There shall be no right of recovery by the husband on account of personal injury or wrong to his wife, or for expenses connected therewith, but the wife may recover against a third person for such injury or wrong as if unmarried, and such recovery shall include expenses of medical treatment and other expenses paid or assumed by the husband. 1953

30-2-5. Separate debts.

(1) Neither spouse is personally liable for the separate debts, obligations, or liabilities of the other:

(a) contracted or incurred before marriage;

(b) contracted or incurred during marriage, except family expenses as provided in Section 30-2-9;

(c) contracted or incurred after divorce or an order for separate maintenance under this title, except the spouse is personally liable for that portion of the expenses incurred on behalf of a minor child for reasonable and necessary medical and dental expenses, and other similar necessities as provided in a court order under Section 30-3-5, 30-4-3, or 78-45-7.15, or an administrative order under Section 62A-11-326; or

(d) ordered by the court to be paid by the other spouse under Section 30-3-5 or 30-4-3 and not in conflict with Section 15-4-6.5 or 15-4-6.7.

(2) The wages, earnings, property, rents, or other income of one spouse may not be reached by a creditor of the other spouse to satisfy a debt, obligation, or liability of the other spouse, as described under Subsection (1). 1995

30-2-6. Actions based on property rights.

Should the husband or wife obtain possession or control of property belonging to the other before or after marriage, the owner of the property may maintain an action therefor, or for any right growing out of the same, in the same manner and to the same extent as if they were unmarried. 1953

30-2-7. Husband's liability for wife's torts.

For civil injuries committed by a married woman damages may be recovered from her alone, and her husband shall not be liable therefor, except in cases where he would be jointly liable with her if the marriage did not exist. 1953

30-2-8. Agency between husband and wife.

A husband or wife may constitute the other his or her attorney in fact to control and dispose of his or her property for their mutual benefit or otherwise, and may revoke the appointment the same as other persons. 1953

30-2-9. Family expenses — Joint and several liability.

The expenses of the family and the education of the children are chargeable upon the property of both husband and wife or of either of them, and in relation thereto they may be sued jointly or separately. 1953

30-2-10. Homestead rights — Custody of children.

Neither the husband nor wife can remove the other or their children from the homestead without the consent of the other, unless the owner of the property shall in good faith provide another homestead suitable to the condition in life of the family; and if a husband or wife abandons his or her spouse, that spouse is entitled to the custody of the minor children unless a court of competent jurisdiction shall otherwise direct. 1977

CHAPTER 3

DIVORCE

participating jurisdiction and shall be made available for review by interested parties.

ARTICLE IX

Existing Statutes Not Repealed

Section 1. All existing statutes prescribing weight and size standards and all existing statutes relating to special permits shall continue to be of force and effect until amended or repealed by law.

ARTICLE X

State Government Departments Authorized to Cooperate with Cooperating Committee

Section 1. Within appropriations available therefor, the departments, agencies and officers of the government of this state shall cooperate with and assist the cooperating committee within the scope contemplated by article IV, section 1(a) and (b) of the agreement. The departments, agencies and officers of the government of this state are authorized generally to cooperate with said cooperating committee. 1981

CHAPTER 24

NONRESIDENT VIOLATOR COMPACT

(Repealed by Laws 1981, ch. 137, § 77.)

41-24-1 to 41-24-9. Repealed.

CHAPTER 25

VICTIM RESTITUTION

(Repealed by Laws 1987, ch. 119, § 3; 1991, ch. 268, § 49.)

41-25-1 to 41-25-8. Repealed.

TITLE 42

NAMES

Chapter
1. Change of Name.
2. Conducting Business Under Assumed Name.
3. Registration of Farm Names.

CHAPTER 1

CHANGE OF NAME

Section
42-1-1. By petition to district court — Contents.
42-1-2. Notice of hearing — Order of change.
42-1-3. Effect of proceedings.

42-1-1. By petition to district court — Contents.

Any natural person, desiring to change his name, may file a petition therefor in the district court of the county where he resides, setting forth:

(1) The cause for which the change of name is sought.

(2) The name proposed.

(3) That he has been a bona fide resident of the county for the year immediately prior to the filing of the petition. 1953

42-1-2. Notice of hearing — Order of change.

The court shall order what, if any, notice shall be given of the hearing, and after the giving of such notice, if any, may order the change of name as requested, upon proof in open court of the allegations of the petition and that there exists proper cause for granting the same. 1953

42-1-3. Effect of proceedings.

Such proceedings shall in no manner affect any legal action or proceeding then pending, or any right, title or interest whatsoever. 1953

CHAPTER 2

CONDUCTING BUSINESS UNDER ASSUMED NAME

Section
42-2-1 to 42-2-4. Repealed.
42-2-5. Certificate of assumed and of true name — Contents — Execution — Filing.
42-2-6. Change in persons transacting business under assumed name.
42-2-6.5. Repealed.
42-2-6.6. Assumed name.
42-2-7. Index — Fees — Evidence.
42-2-8. Expiration of filing — Notice — Removal from active index.
42-2-9. Corporate names, limited liability company names, and trademark, service mark, and trade name rights not affected.
42-2-10. Penalties.
42-2-11. Persons doing business under assumed name to have registered office and registered agent — Penalties — Presumption of registered agent.

42-2-1 to 42-2-4. Repealed. 1963

42-2-5. Certificate of assumed and of true name — Contents — Execution — Filing.

(1) Every person who carries on, conducts, or transacts business in this state under an assumed name, whether that business is carried on, conducted, or transacted as an individual, association, partnership, corporation, or otherwise, shall file with the Division of Corporations and Commercial Code a certificate setting forth:

(a) the name under which the business is, or is to be carried on, conducted, or transacted, and the full true name, or names, of the person owning, and the person carrying on, conducting, or transacting the business;

(b) the location of the principal place of business, and the street address of the person.

(2) The certificate shall be executed by the person owning, and the person carrying on, conducting, or transacting the business, and shall be filed not later than 30 days after the time of commencing to carry on, conduct, or transact the business.

(3) "Filed" means the Division of Corporations and Commercial Code has received and approved, as to form, a document submitted under the provisions of this chapter, and has marked on the face of the document a stamp or seal indicating the time of day and date of approval, the name of the division, the division director's signature and division seal, or facsimiles of the signature or seal. 1990

42-2-6. Change in persons transacting business under assumed name.

An amended certificate shall be filed with the Division of Corporations and Commercial Code not later than 30 days after any change in the person or persons owning, carrying on, conducting, or transacting such business or a change in the registered agent or office of the business or in any information required to be filed with the Division of Corporations and Commercial Code under this act. 1984

42-2-6.5. Repealed. 1985

42-2-6.6. Assumed name.

(1) The assumed name:

(a) may not contain any word or phrase that indicates or implies that the business is organized for any purpose other than one or more of the purposes contained in its application;

(b) shall be distinguishable from any registered name or trademark of record in the offices of the Division of Corporations and Commercial Code, as defined in Subsection 16-10a-401(5), except as authorized by the Division of Corporations and Commercial Code pursuant to Subsection (2); and

(c) may not, without the written consent of the United States Olympic Committee, contain the words "Olympic," "Olympiad," or "Citius Altius Fortius."

(2) The Division of Corporations and Commercial Code shall authorize the use of the name applied for if the name is distinguishable from one or more of the names and trademarks that are on the division's records, or if the applicant delivers to the division a certified copy of the final judgment of a court of competent jurisdiction establishing the applicant's right to use the name applied for in this state.

(3) The assumed name, for purposes of recordation, shall be either translated into English or transliterated into letters of the English alphabet if it is not in English.

(4) The Division of Corporations and Commercial Code may not approve an application for an assumed name to any person violating the provisions of this section.

(5) The director of the Division of Corporations and Commercial Code shall have the power and authority reasonably necessary to interpret and efficiently administer this section and to perform the duties herein imposed upon the division by this section.

(6) A name which implies by any word in the name that it is an agency of the state or of any of its political subdivisions, if it is not actually such a legally established agency, may not be approved for filing by the Division of Corporations and Commercial Code.

(7) The provisions of Section 16-10a-403 apply to this chapter. 1992

42-2-7. Index — Fees — Evidence.

(1) The Division of Corporations and Commercial Code shall:

(a) keep an active alphabetical index of all persons filing the certificates provided for in this chapter; and

(b) collect the required indexing and filing fees.

(2) A copy of any such certificate certified by the Division of Corporations and Commercial Code shall be presumptive evidence of the facts contained in the certificate. 1988

42-2-8. Expiration of filing — Notice — Removal from active index.

A filing under this chapter shall be effective for a period of three years from the date of filing. At the expiration of that period, if no new filing is made by or on behalf of the person who made the original filing, the Division of Corporations and Commercial Code shall send a notice by regular mail, postage prepaid, to the address shown in the filing indicating that it has expired. If no new filing is made within 30 days after the date of mailing the notice, the Division of Corporations and Commercial Code shall remove the name from the active alphabetical index, and place it on a permanent inactive alphabetical index. 1987

42-2-9. Corporate names, limited liability company names, and trademark, service mark, and trade name rights not affected.

(1) This chapter does not affect or apply to any corporation organized under the laws of any state if it does business under its true corporate name.

(2) This chapter does not affect the statutory or common law trademark, service mark, or trade name rights granted by state or federal statute.

(3) This chapter does not affect or apply to any limited liability company doing business in this state under its true name. 1992

42-2-10. Penalties.

Any person who carries on, conducts, or transacts business under an assumed name without having complied with the provisions of this chapter, and until the provisions of this chapter are complied with:

(1) shall not sue, prosecute, or maintain any action, suit, counterclaim, cross complaint, or proceeding in any of the courts of this state; and

(2) may be subject to a penalty in the form of a late filing fee determined by the division director in an amount not to exceed three times the fees charged under Section 42-2-7 and established under Section 63-38-3.2. 1994

42-2-11. Persons doing business under assumed name to have registered office and registered agent — Penalties — Presumption of registered agent.

(1) (a) Any person conducting or transacting business in this state under an assumed name under this chapter shall, for service of process purposes, comply with and be subject to Sections 16-10a-501 through 16-10a-504, as though he were a corporation.

(b) If the person conducting business or transacting business in this state under an assumed name under this chapter is a foreign corporation, it must be qualified to conduct or transact business under the provisions of Sections 16-10a-1501 through 16-10a-1511.

(2) If a person fails to maintain a registered office or registered agent as required by Sections 16-10a-501 and 16-10a-502, the Division of Corporations and Commercial Code shall mail a notice to him that the filing will be canceled if a registered office and registered agent are not designated. If the registered office and registered agent are not designated within 30 days after the date of mailing the notice, the Division of Corporations and Commercial Code shall remove the name from the alphabetical index, place it on a permanent inactive alphabetical index, and mail a notice to the applicant that the filing has been canceled.

(3) The person filing a certificate under Section 42-2-5 shall be presumed to be the registered agent if the person is a resident of this state, and the person's Utah address shall be presumed to be the registered office for purposes of this chapter. 1992

CHAPTER 3

REGISTRATION OF FARM NAMES

42-3-1. Commissioner of agriculture to register names.

Any owner of a farm in this state may have the name of his farm, together with a brief description of his lands to which such name applies, recorded in a register kept for the purpose in the office of the commissioner of agriculture, and the commissioner of agriculture shall furnish to such landowner a proper certificate setting forth such name and a brief descrip-

action, to prove permanence of injuries and to warrant instructions to jury thereon, 18 A.L.R.3d 170.

Propriety and effect, in eminent domain proceeding, of instruction to the jury as to landowner's unwillingness to sell property, 20 A.L.R.3d 1081.

Verdict-urging instructions in civil case stressing desirability and importance of agreement, 38 A.L.R.3d 1281.

Verdict-urging instructions in civil case commenting on weight of majority view or authorizing compromise, 41 A.L.R.3d 845.

Verdict-urging instructions in civil case admonishing jurors to refrain from intransigence or reflecting on integrity or intelligence of jurors, 41 A.L.R.3d 1154.

Construction of statutes or rules making mandatory the use of pattern or uniform approved jury instructions, 49 A.L.R.3d 128.

Necessity and propriety of instructing on alternative theories of negligence or breach of warranty, where instruction on strict liability in tort is given in products liability case, 52 A.L.R.3d 101.

Federal Rules of Civil Procedure, construction and effect of provision in Rule 51, and similar state rules, that counsel be given opportunity to make objections to instructions out of hearing of jury, 1 A.L.R. Fed. 310.

Key Numbers. — Trial ⇐ 182 to 296.

Rule 52. Findings by the court.

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

(b) **Amendment.** Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

(c) **Waiver of findings of fact and conclusions of law.** Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact:

(1) by default or by failing to appear at the trial;

(2) by consent in writing, filed in the cause;

(3) by oral consent in open court, entered in the minutes.

(Amended effective Jan. 1, 1987.)

Compiler's Notes. — This rule is similar to Rule 52, F.R.C.P.

NOTES TO DECISIONS

ANALYSIS

Adoption.

—Abandonment of contract.

In a contract action by a real estate broker for his commission, where the defendant raises the issue of abandonment of the contract by his answer, the court should make findings on the issue of abandonment. Failure of the trial court to make findings of fact on all material issues is reversible error where it is prejudicial. Gaddis Inv. Co. v. Morrison, 3 Utah 2d 43, 278 P.2d 284 (1954).

—Advisory verdict.

The trial court has the responsibility to make findings of fact and conclusions of law, notwithstanding the advisory verdict of a jury. Romrell v. Zions First Nat'l Bank, 611 P.2d 392 (Utah 1980).

—Breach of contract.

Where plaintiffs, in action for breach of contract, requested finding by court on material issue as to whether the foundation of their house had been located in accordance with zoning ordinances and restrictive covenants, it was the duty of the court to make such a finding. Quagliana v. Exquisite Home Bldrs., Inc., 538 P.2d 301 (Utah 1975).

—Child custody.

The trial court must enter specific findings on the factors relied upon in awarding or modifying the custody of a child. Hutchison v. Hutchison, 649 P.2d 38 (Utah 1982).

—Credibility of witnesses.

Credibility itself is not a factual issue that is appropriately the subject of the trial court's findings; rather, the findings of the ultimate facts implicitly reflect consideration of the believability of the witnesses' testimony. Adoption of McKinstray v. McKinstray, 628 P.2d 1286 (Utah 1981).

—Denial of motion.

Subdivision (a) does not require that the denial of a motion be accompanied by specific findings of fact and conclusions of law. State v. Poteet, 692 P.2d 760 (Utah 1984).

—Divorce decree modifications.

Where the modification of a divorce decree is granted, the trial court should make findings to indicate the reasons why modification was found to be appropriate. Christensen v. Christensen, 628 P.2d 1297 (Utah 1981).

Court action on a request to modify a divorce decree is not included in those "decisions on motions" referred to in Subdivision (a), and therefore the trial court is not exempt from the requirements of Subdivision (a). Stoddard v. Stoddard, 642 P.2d 743 (Utah 1982); Montoya v. Montoya, 696 P.2d 1193 (Utah 1985).

—Easement.

In a suit to establish right of way for an irrigation ditch by prescriptive easement, where the pleadings made an issue of whether easement had been acquired and it was clear that the ditch had been used for more than twenty years to irrigate lands of plaintiffs, trial court was required to make a direct finding on that issue. Harmon v. Rasmussen, 13 Utah 2d 422, 375 P.2d 762 (1962).

—Evidentiary disputes.

Although findings should be made on all material subordinate and ultimate factual issues, it is not necessary that a court resolve all conflicting evidentiary issues. Sorenson v. Beers, 614 P.2d 159 (Utah 1980).

—Juvenile action.

In juvenile action, court must not only make findings to support the proof of every fact necessary to constitute the offense charged, but also make findings to support the preliminary adjudication that the child is within the jurisdiction of the juvenile court. In re R.N., 527 P.2d 1356 (Utah 1974).

—Material issues.

Failure to find upon all material issues raised by the pleadings is reversible error. LeGrand Johnson Corp. v. Peterson, 18 Utah 2d 260, 420 P.2d 615 (1966).

It is the duty of the trial judge in contested cases to find facts upon all material issues submitted for decision unless findings are waived. Boyer Co. v. Lignell, 567 P.2d 1112 (Utah 1977).

Although findings should be made on all material subordinate and ultimate factual issues, it is not necessary that a court resolve all conflicting evidentiary issues. In re Estate of Grimm, 784 P.2d 1238 (Ct. App. 1989), cert. denied, 795 P.2d 1138 (Utah 1990).

——Harmless error.

Trial court's failure to make findings on a material issue was harmless error where the evidence was clear, uncontroverted, and only capable of supporting a finding in favor of the judgment. Kinkella v. Baugh, 660 P.2d 233 (Utah 1983).

—Submission by prevailing party.

——Court's discretion.

It is in the discretion of the trial court to adopt the findings as submitted to that court by the prevailing party, as long as the findings are not clearly contrary to the evidence. Boyer Co. v. Lignell, 567 P.2d 1112 (Utah 1977).

—Water dispute.

——Findings of state engineer.

Where a court adopts findings by a state engineer which adequately define the rights of all parties involved in a water dispute, it is not necessary for the trial court to make its own, independent findings of fact and conclusions of law. In re Use of Water, 12 Utah 2d 102, 363 P.2d 199 (1961).

Amendment.

—Motion.

——Caption.

A document entitled "Plaintiffs' Objections and Additions to Proposed Findings of Fact and Conclusions of Law" filed after entry of judgment against plaintiffs was properly construed by the trial court as a motion pursuant to Subdivision (b) because, regardless of how it is captioned, a motion filed within 10 days of the entry of judgment that questions the correctness of the court's findings and conclusions is properly treated as a post-judgment motion; the substance of a motion, not its caption, is controlling. DeBry v. Fidelity Nat'l Title Ins. Co., 828 P.2d 520 (Utah Ct. App. 1992), cert. denied, 857 P.2d 948 (Utah 1993).

——Conformance with original findings.

Where court on its own initiative amended jury's finding but within 10 days the defendant filed a motion to amend the judgment back to conform to the original findings, court had power, under this rule, to grant the motion. National Farmers' Union Property & Cas. Co. v. Thompson, 4 Utah 2d 7, 286 P.2d 249, 61 A.L.R.2d 635 (1955).

——New trial.

Motion for amendment of findings, timely made and served upon all parties, invokes the continuing jurisdiction of the court and suspends the finality of the judgment until the motion is ruled upon; if the interests of justice require setting aside the findings and judgment, the appropriate procedure is to grant a new trial as to all parties. Valley Bank & Trust Co. v. Gerber, 526 P.2d 1121 (Utah 1974).

——Notice of appeal.

A quick filing of a notice of appeal by one party cannot defeat the adverse party's right to have the district court consider the merits of a motion under Subdivision (b) filed within ten days after entry of the judgment. Whiting v. Clayton, 617 P.2d 362 (Utah 1980).

Utah R. App. P. 4(b) requires the filing of a new notice of appeal within the prescribed time after entry of the trial court's order disposing of a Subdivision (b) post-judgment motion. DeBry v. Fidelity Nat'l Title Ins. Co., 828 P.2d 520 (Utah Ct. App. 1992), cert. denied, 857 P.2d 948 (Utah 1993).

——Time.

Rule 60(b) may not be used to extend the time in which a motion may be filed pursuant to Subdivision (b). Goddard v. Bundy, 121 Utah 299, 241 P.2d 462 (1952).

Defendants' motion under this rule, filed more than 10 days after entry of judgment, was not timely and trial court could not extend time for appeal from denial of such motion by invoking Rule 60(b)(1) based on inadvertence, mistake, or excusable neglect of their attorney since trial court may only extend time for taking action under these rules under conditions in Rule 6(b). Holbrook v. Hodson, 24 Utah 2d 120, 466 P.2d 843 (1970).

——Tolling of appeal period.

If a motion is made, pursuant to Subdivision (b), before judgment and presents a substantial question, and the motion is not disposed of, either expressly or by necessary implication, by the judgment, the running of the time for taking an appeal is suspended until the court disposes of the motion. Zions First Nat'l Bank v. C'est Bon Venture, 613 P.2d 515 (Utah 1980).

——When made.

The motion to amend or make additional findings of fact under Subdivision (b) need not await the entry of judgment, but may be made prior thereto. Zions First Nat'l Bank v. C'est Bon Venture, 613 P.2d 515 (Utah 1980).

Because the motion to amend findings of fact was made orally more than four years after entry of the judgment on remand, and was granted in the same hearing, without notice, it was an abuse of discretion on the part of the trial court to entertain the motion. Cornish Town v. Koller, 798 P.2d 753 (Utah 1990).

—Overruling or vacation.

——Another district judge.

Order for hearing on the merits of a final amended account of an estate entered by one district judge and not appealed or objected to could not be vacated or overruled by another district judge. Tanner v. Mecham, 537 P.2d 312 (Utah 1975).

——Lack of notice.

Ex parte order approving the amended account of an administrator was properly vacated

by the court upon timely filing of objection on grounds of lack of notice to objectors. Tanner v. Mecham, 537 P.2d 312 (Utah 1975).

Child custody awards.

Oral findings made by the trial judge at the close of the evidence were sufficient to support a custody award and demonstrate that the determination was based on factors relevant to the best interests of the child. Hansen v. Hansen, 736 P.2d 1055 (Utah Ct. App.), cert. denied, 765 P.2d 1277 (Utah 1987).

Child custody award must be firmly anchored on findings of fact that (1) are sufficiently detailed, (2) include enough facts to disclose the process through which the ultimate conclusion is reached, (3) indicate the process is logical and properly supported, and (4) are not clearly erroneous. Marchant v. Marchant, 743 P.2d 199 (Utah Ct. App. 1987).

Case was remanded to trial court for entry of appropriate findings, where the mother sought modification of custody of the children on a theory of changed circumstances, and, other than an unsigned statement by the trial court that the father was still the primary caretaker, the court's order neither discussed the mother's evidence in support of her affidavit nor compared that evidence with the factors underlying the original award. Jensen v. Jensen, 775 P.2d 436 (Utah Ct. App. 1989).

Criminal cases.

Subdivision (a) of this rule applies in criminal cases by virtue of U.R.Crim.P. 26(7). State v. Walker, 743 P.2d 191 (Utah 1987).

The Supreme Court has abandoned the pre-Rule 52(a) position that the standard of review in criminal cases must be the same for both jury and bench verdicts. State v. Walker, 743 P.2d 191 (Utah 1987).

Utah R.Civ.P. 52 applies to criminal actions under U.R.Crim.P. 26(7) and U.R.Civ.P. 81(e). State v. Goodman, 763 P.2d 786 (Utah 1988).

Criminal contempt.

In a proceeding for criminal contempt, there was no need to remand for written findings, because the trial court articulated in the transcript, as well as in the "Findings and Conclusions" section of the "Minutes, Findings and Order" document, explicit findings addressing the three elements of contempt. State v. Hurst, 821 P.2d 467 (Utah Ct. App. 1991).

Effect.

—Preclusion of summary judgment.

While findings of fact are unnecessary to support granting of summary judgment, the grant of summary judgment is precluded where trial judge did make and enter findings and conclusions, the content of which evidence material issues of fact. Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, Chartered, 681 P.2d 1258 (Utah 1984).

—Relation to pleadings.

Findings of fact and conclusions of law will support a judgment, even though they are general, if they follow the allegations of well-formulated pleadings in most respects. In re Estate of Grimm, 784 P.2d 1238 (Utah Ct. App. 1989), cert. denied, 795 P.2d 1138 (Utah 1990).

Failure to object to findings.

The failure to object to the findings of fact, in the form of a motion for a new trial or amendment of judgment, was not fatal to the defendants' appeal from a proceeding in equity. Dugan v. Jones, 724 P.2d 955 (Utah 1986).

How findings entered.

In assessing the sufficiency of the findings, the appellate court is not confined to the contents of a particular document entitled "Findings"; rather, the findings may be expressed orally from the bench or contained in other documents. Erwin v. Erwin, 773 P.2d 847 (Utah Ct. App. 1989).

This rule does not mandate the entry of signed, written findings and conclusions. On the contrary, the court may even state its findings orally if it chooses. Martindale v. Adams, 777 P.2d 514 (Utah Ct. App. 1989).

Judgments upon multiple claims or parties.

Pursuant to the requirement of Subdivision (a) that the trial court "find the facts specially," in order to facilitate appellate review of judgments certified as final under Rule 54(b), the trial court should enter findings supporting the conclusion that such orders are final and the findings should explain the lack of factual overlap between the certified and remaining claims. Bennion v. Pennzoil Co., 826 P.2d 137 (Utah 1992).

Judicial review.

On review, the appellate court is not limited to written findings, and may properly examine findings expressed solely from the bench or contained in other court documents, such as court memoranda. Merriam v. Merriam, 799 P.2d 1172 (Utah Ct. App. 1990).

—Equity cases.

The "clearly erroneous" standard of review stated in Subdivision (a) is applicable in equity cases. Bellon v. Malnar, 808 P.2d 1089 (Utah 1991).

—Standard of review.

In reviewing an interlocutory order permitting discovery where issues of fact are involved and there are no findings of fact, the court does not review the facts but assumes that the trier of facts found them in accord with its decision, and will affirm the decision if from the evidence it would be reasonable to find facts to support it. Mower v. McCarthy, 122 Utah 1, 245 P.2d 224 (1952).

A finding is clearly erroneous if it is against the great weight of the evidence or if the court is otherwise definitely and firmly convinced that a mistake has been made. State v. Walker, 743 P.2d 191 (Utah 1987); Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co., 744 P.2d 1376 (Utah 1987); Stevens v. Stevens, 754 P.2d 952 (Utah Ct. App. 1988); Southland Corp. v. Potter, 760 P.2d 320 (Utah Ct. App. 1988); T.R.F. v. Felan, 760 P.2d 906 (Utah Ct. App. 1988); State, In re N.H.B., 777 P.2d 487 (Utah Ct. App.), cert. denied, 789 P.2d 33 (Utah 1989); Bountiful v. Riley, 784 P.2d 1174 (Utah 1989); State v. Burk, 839 P.2d 880 (Utah Ct. App. 1992), cert. denied, 853 P.2d 897 (Utah 1993).

The "clearly erroneous" standard applies whether the case is one in equity or one at law. Barker v. Francis, 741 P.2d 548 (Utah Ct. App. 1987); Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896 (Utah 1989); Bountiful v. Riley, 784 P.2d 1174 (Utah 1989); Grahn v. Gregory, 800 P.2d 320 (Utah Ct. App. 1990), cert. denied, 843 P.2d 516 (Utah 1991).

If there is a reasonable basis in evidence, a trial court's award of damages will be affirmed on appeal. Gillmor v. Gillmor, 745 P.2d 461 (Utah Ct. App. 1987), cert. denied, 765 P.2d 1278 (Utah 1988).

Application of the "clearly erroneous" standard in Subdivision (a) does not eliminate the deference traditionally accorded the fact finder to determine the credibility of witnesses. State v. Wright, 744 P.2d 315 (Utah Ct. App. 1987); Henderson v. For-Shor Co., 757 P.2d 465 (Utah Ct. App. 1988).

The "clearly erroneous" standard in Subdivision (a) applies to review of competency proceedings because they are civil rather than criminal in nature. State v. Lafferty, 749 P.2d 1239 (Utah 1988), aff'd, 776 P.2d 631 (Utah 1989), conviction vacated on ground that competency not properly established, 949 F.2d 1546 (10th Cir. 1991).

On appeal of a judgment from the bench after trial, the appellate court defers to the trial court's factual assessment unless there is clear error. Copper State Leasing Co. v. Blacker Appliance & Furn. Co., 770 P.2d 88 (Utah 1988); Eskelsen v. Town of Perry, 819 P.2d 770 (Utah 1991).

When reviewing trial court's finding based solely on written materials and involving no assessment of witness credibility or competency, the Court of Appeals is in as good a position as the trial court to examine the evidence de novo and determine the facts, rather than review the determination under the standard set forth in Subdivision (a), which would defer to the trial judge's ability to assess the credibility of witnesses and set aside the finding only if clearly erroneous. In re Infant Anonymous, 760 P.2d 916 (Utah Ct. App. 1988).

When reviewing a bench trial in a criminal action for sufficiency of the evidence, the appellate court must sustain the trial court's judgment unless it is against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made. State v. Goodman, 763 P.2d 786 (Utah 1988).

Findings of fact are clearly erroneous if the appellant can show that they are without adequate evidentiary foundation or if they are induced by an erroneous view of the law. Western Capital & Secs., Inc. v. Knudsvig, 768 P.2d 989 (Utah Ct. App.), cert. denied, 779 P.2d 688 (Utah 1989).

Findings of fact are clearly erroneous if it can be shown that they are against the clear weight of evidence or that they induce a definite and firm conviction that a mistake has been made. Maughan v. Maughan, 770 P.2d 156 (Utah Ct. App. 1989); Monroc, Inc. v. Sidwell, 770 P.2d 1022 (Utah Ct. App. 1989); Weston v. Weston, 773 P.2d 408 (Utah Ct. App. 1989); Butler v. Lee, 774 P.2d 1150 (Utah Ct. App. 1989).

A finding attacked as lacking adequate evidentiary support is deemed "clearly erroneous" only if the appellate court concludes that the finding is against the clear weight of the evidence. Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896 (Utah 1989); In re Estate of Grimm, 784 P.2d 1238 (Utah Ct. App. 1989), cert. denied, 795 P.2d 1138 (Utah 1990).

The decision of the trial court to terminate parental rights will be disturbed only if the findings are clearly erroneous. Bingham v. McArthur, 808 P.2d 1122 (Utah Ct. App. 1991).

——**Conclusions of law.**

While findings of fact will not be set aside unless they are clearly erroneous, conclusions of law are simply reviewed for correctness without any special deference. Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co., 744 P.2d 1376 (Utah 1987); General Glass Corp. v. Mast Constr. Co., 766 P.2d 429 (Utah Ct. App. 1988); Bountiful v. Riley, 784 P.2d 1174 (Utah 1989); Smith v. Smith, 793 P.2d 407 (Utah Ct. App. 1990); Eskelsen v. Town of Perry, 819 P.2d 770 (Utah 1991).

Where the pivotal question is a question of law, the Court of Appeals applies a correction-of-error standard with no particular deference accorded the trial court's construction. T.R.F. v. Felan, 760 P.2d 906 (Utah Ct. App. 1988).

A trial court's conclusions of law are reviewed under a correction of error standard. Bailey v. Call, 767 P.2d 138 (Utah Ct. App.), cert. denied, 773 P.2d 45 (Utah 1989).

——**Criminal cases.**

While the trial court's conclusions should be respected, a conviction may not oppose the weight of the evidence. State v. Strieby, 790 P.2d 98 (Utah Ct. App.), cert. denied, 795 P.2d 1138 (Utah 1990).

In reviewing the trial court's decision to admit evidence of an identification of the accused, the appellate court will defer to the trial court's fact-finding role by viewing the facts in the light most favorable to the trial court's decision to admit and by reversing its factual findings only if they are against the clear weight of the evidence. State v. Ramirez, 817 P.2d 774 (Utah 1991).

——**Criminal trials.**

The clear weight of the evidence standard does not require that the defendant in a criminal action present the more compelling evidence at trial. Instead, this standard requires that the clear weight of the evidence presented at trial not be contrary to the verdict. A defendant's conviction must still be based on evidence establishing guilt beyond a reasonable doubt, but, on appeal, the standard of review aids the defendant in his effort to obtain a reversal. State v. Goodman, 763 P.2d 786 (Utah 1988).

——**Findings of facts by jury.**

The standard that to successfully attack a verdict, an appellant must marshall all the evidence supporting the verdict and then demonstrate that, even viewing the evidence in the light most favorable to that verdict, the evidence is insufficient to support it, is also appli-

cable to a jury's factual findings. Cambelt Int'l Corp. v. Dalton, 745 P.2d 1239 (Utah 1987).

——Intent.

Questions of intent as determined by extrinsic evidence are questions of fact to be decided by the trier of fact and are subject to the "clearly erroneous" standard of review. Sprouse v. Jager, 806 P.2d 219 (Utah Ct. App. 1991).

Juvenile proceedings.

The standard set forth in Subdivision (a) of this rule is appropriate and applicable in non-jury juvenile court cases involving criminal violations. In re R.L.I., 771 P.2d 1068 (Utah 1989).

Purpose of rule.

The right to resort to the courts for the adjudication of grievances and the settlement of disputes is a fundamental and important one, and an indispensable requisite to fulfilling that responsibility is the determination of questions of fact upon which there is disagreement; it is for that reason that the rules impose the duty of making filings on all material issues. LeGrand Johnson Corp. v. Peterson, 18 Utah 2d 260, 420 P.2d 615 (1966).

Stipulations.

Trial court's failure to file findings of fact and conclusions of law did not require reversal, where the facts were stipulated and therefore undisputed, and the Court of Appeals was able to scrutinize the stipulated facts and make its own determination as to the proper conclusions of law the facts dictated. Dover Elevator Co. v. Hill Mangum Invs., 766 P.2d 424 (Utah Ct. App. 1988).

When a trial court relies on stipulated facts to decide a case, the appellate court does not apply the clearly erroneous standard, but will sustain the lower court's decision only if convinced of its correctness. This principle also obtains when stipulated facts are supplemented by proffers by counsel. Bess v. Jensen, 782 P.2d 542 (Utah Ct. App. 1989).

Sufficiency.

—Allegations of pleadings.

Substantial compliance with this rule does not require that the trial court negative every allegation contained in the pleadings; rather, the rule is satisfied if, from the findings the trial court makes, there can be no reasonable *inference other than that it must have found* against such allegations. Parks v. Zions First Nat'l Bank, 673 P.2d 590 (Utah 1983).

—Burden on appeal.

It is appellant's burden to cite the appellate court to all the evidence in the record that would support the determination reached and then demonstrate why, even when viewed in the light most favorable to the court below, it is insufficient to support the finding under attack. Harker v. Condominiums Forest Glen, Inc., 740 P.2d 1361 (Utah Ct. App. 1987); Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896 (1989); Saunders v. Sharp, 793 P.2d 927 (Utah Ct. App. 1990).

The appellant assailed the sufficiency of the evidence to support the trial judge's findings of fact. His brief contained a heading "FACTS," under which he set forth both parties' "versions" of the facts. This did not constitute a sufficient marshalling of the evidence in support of the findings made by the court below, which was required before he could have demonstrated that even viewing it in the light most favorable to the court below, the evidence was insufficient to support the findings. Fitzgerald v. Critchfield, 744 P.2d 301 (Utah Ct. App. 1987).

To mount a successful challenge to trial court findings under Subdivision (a) of this rule, an appellant must marshal the evidence supporting the trial court's findings. Only then can the appellate court determine whether those findings are clearly erroneous. Cornish Town v. Koller, 758 P.2d 919 (Utah 1988).

The challenging party must marshal all relevant evidence presented at trial that tends to support the findings and demonstrate why the findings are clearly erroneous. West Valley City v. Majestic Inv. Co., 818 P.2d 1311 (Utah Ct. App. 1991).

The way to attack findings that appear to be complete and that are sufficiently detailed is to marshal the supporting evidence and then demonstrate that the evidence is inadequate to sustain such findings. But where the findings are not of that caliber, appellant need not go through a futile marshaling exercise. Rather, appellant can simply argue the legal insufficiency of the court's findings as framed. Woodward v. Fazzio, 823 P.2d 474 (Utah Ct. App. 1991).

—Found insufficient.

Divorce case was remanded for adequate findings on the issues of alimony and fees, where no findings had been made regarding the wife's financial condition and needs, and, although the record contained substantial evidence regarding the parties' financial situation and the reasonableness of the fees, the findings were deficient because they failed to evaluate these factors. Rudman v. Rudman, 812 P.2d 73 (Utah Ct. App. 1991).

In divorce action, where trial court record did not reveal whether order regarding assignment of retirement benefits was intended as an enforcement or a modification of a previous order, appellate court remanded the issue for the court below to make findings of fact and conclusions of law. Adelman v. Adelman, 815 P.2d 741 (Utah Ct. App. 1991).

——Vacation of judgment.

The failure of a trial court to enter adequate findings requires that the judgment be vacated. Anderson v. Utah County Bd. of County Comm'rs, 589 P.2d 1214 (Utah 1979).

—Found sufficient.

Finding that "claim of plaintiff of the relationship of attorney client is not supported by the weight of credible evidence and the court finds said issue in favor of defendant and against plaintiff" was sufficient in action in which plaintiff claimed the attorney had established a professional relationship with her and was to purchase property at foreclosure sale for her; although more detailed factual findings would have been appropriate, such additional

findings in this case were not mandatory. Sorenson v. Beers, 614 P.2d 159 (Utah 1980).

Sufficient evidence to support the finding as to division of marital property. See Colman v. Colman, 743 P.2d 782 (Utah Ct. App. 1987).

Findings of fact, based on expert testimony, and not "clearly erroneous," accepted on appeal. See O'Brien v. Rush, 744 P.2d 306 (Utah Ct. App. 1987).

In divorce action, value of retirement benefits, as found by trial court, substantiated by record. See Canning v. Canning, 744 P.2d 325 (Utah Ct. App. 1987).

In a fraud action, because there was substantial competent evidence to support the trial court's finding that no false representations were knowingly made, and because the appellate court was convinced that the factfinder made no mistake, the finding was not disturbed on appeal. Brown v. Harry Heathman, Inc., 744 P.2d 1016 (Utah Ct. App. 1987).

Evidence found sufficient in a bench trial to support the trial court's judgment convicting defendant of second-degree murder. State v. Goodman, 763 P.2d 786 (Utah 1988).

Findings of fact, though not model of clarity, were sufficiently detailed to reveal trial court's reasoning processes. See Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896 (Utah 1989).

—Opinion or memorandum of decision.

An opinion or memorandum of decision filed by a court sitting as trier of the fact may be consulted where the findings of fact and conclusions of law are inadequate; and, if that opinion or memorandum contains the findings of fact, that is sufficient compliance with Subdivision (a). Sprague v. Boyles Bros. Drilling Co., 4 Utah 2d 344, 294 P.2d 689 (1956).

A trial judge's memorandum decision can be regarded as findings of fact but only as to those findings recited therein. Thomas v. Thomas, 569 P.2d 1119 (Utah 1977).

—Recitals of procedures.

"Findings of fact" must be more than simply recitals of the procedures involved in the development of the case. Anderson v. Utah County Bd. of County Comm'rs, 589 P.2d 1214 (Utah 1979).

—Technical error.

Trial court's mere clerical oversight in failing to sign its findings and conclusions did not require disturbing the judgment. Martindale v. Adams, 777 P.2d 514 (Utah Ct. App. 1989).

—Ultimate facts.

Findings should be limited to the ultimate facts and if they ascertain ultimate facts, and sufficiently conform to the pleadings and the evidence to support the judgment, they will be regarded as sufficient. Pearson v. Pearson, 561 P.2d 1080 (Utah 1977).

Summary judgment.

Findings of fact are unnecessary in connection with summary judgment decisions. Taylor v. Estate of Taylor, 770 P.2d 163 (Utah Ct. App. 1989).

—Statement of grounds.

For an appellate court, a statement of grounds found by the trial court to justify summary judgment would be of great assistance, and in an appropriate case, failure to do so may justify remand to the trial court. Masters v. Worsley, 777 P.2d 499 (Utah Ct. App. 1989).

Under Subdivision (a) the trial court is required to make a brief written statement to explain which alternative theory it accepted in granting summary judgment. However, failure to object or to move the trial court to correct this oversight under Subdivision (b) precludes the Court of Appeals from considering the error on appeal. Alford v. Utah League of Cities & Towns, 791 P.2d 201 (Utah Ct. App. 1990).

Inasmuch as summary judgment is only appropriate when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law, the inclusion of the requirement in Subdivision (a) that the court issue a statement of the grounds for its decision cannot bear upon the undisputed factual basis for the decision. Hence, it can only bear upon alternative theories of law that may apply to the facts. Neerings v. Utah State Bar, 817 P.2d 320 (1991).

An important reason for inclusion of the requirement that the trial court state the ground for its decision in summary judgment cases is administrative in nature: to provide a ready basis for review on appeal. However, also from the administrative point of view, failure to state the grounds for its decision is not reversible error. Rather, in an appropriate case, failure to do so may only justify remand to the trial court. Neerings v. Utah State Bar, 817 P.2d 320 (1991).

Subdivision (a) requires that the court state its grounds for granting a motion for summary judgment when the motion was based on more than one ground. The statement serves to inform the parties and to provide a ready basis for review on appeal. Neiderhauser Bldrs. & Dev. Corp. v. Campbell, 824 P.2d 1193 (Utah Ct. App. 1992).

A trial judge's failure to comply with the last sentence of Subdivision (a), requiring the court to "issue a brief written statement of the ground for its decision on all motions [for summary judgment] granted ... when the motion is based on more than one ground," alone is not reversible error unless there are unusual circumstances. Allen v. Prudential Property and Cas. Ins. Co., 839 P.2d 798 (Utah 1992).

The trial court's blanket statement granting defendant's motion for summary judgment provided no guidance as to the court's reasoning and therefore did not comply with Subdivision (a) of this rule, which requires trial judges to issue brief written statements of their reasons for granting summary judgment when multiple grounds are presented. Although failure to issue a statement of grounds is not reversible error absent unusual circumstances, the presumption of correctness ordinarily afforded trial court rulings has little operative effect when members of the appellate court cannot divine the trial court's reasoning. Retherford v. AT & T Communications of the Mt. States, Inc., 844 P.2d 949 (Utah 1992).

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vided no guidance as to the court's reasoning and therefore did not comply with Subdivision (a) of this rule, which requires trial judges to issue brief written statements of their reasons for granting summary judgment when multiple grounds are presented. Although failure to issue a statement of grounds is not reversible error absent unusual circumstances, the presumption of correctness ordinarily afforded trial court rulings has little operative effect when members of the appellate court cannot divine the trial court's reasoning. Retherford v. AT & T Communications of the Mt. States, Inc., 844 P.2d 949 (Utah 1992).

Where defendant's motion for summary judgment was based on one ground, namely that there was not a genuine issue of material fact, the trial court complied with the requirements of Subdivision (a) when it issued a brief written statement granting defendant's motion and indicating that there were no genuine issues of material fact. Thayne v. Beneficial Utah, Inc., 874 P.2d 120 (Utah 1994).

Waiver.

—Failure of court.

Although this rule has not contained provisions allowing a waiver of findings of facts by the court since 1965, where a party waives findings of fact and conclusions of law, he cannot take advantage of failure of the court in that regard on appeal. Farrell v. Turner, 25 Utah 2d 351, 482 P.2d 117 (1971).

When filed.

—Tardy filing.

Failure of lower court to file its finding of fact and conclusions of law until nineteen days after entry of judgment was not reversible error where complaining party failed to show that judgment would have been different had rule been complied with. Ellison v. Johnson, 18 Utah 2d 374, 423 P.2d 657 (1967).

Cited in Nunley v. Stan Katz Real Estate, Inc., 15 Utah 2d 126, 388 P.2d 798 (1964); State v. Kelsey, 532 P.2d 1001 (Utah 1975); State ex rel. K.D.S., 578 P.2d 9 (Utah 1978); Howard v. Howard, 601 P.2d 931 (Utah 1979); Chandler v. West, 610 P.2d 1299 (Utah 1980); Meese v. Brigham Young Univ., 639 P.2d 720 (Utah 1981); Cerritos Trucking Co. v. Utah Venture No. 1, 645 P.2d 608 (Utah 1982); York v. Unqualified Wash. County Elected Officials, 714 P.2d 679 (Utah 1986); Transamerica Cash Reserve, Inc. v. Hafen, 723 P.2d 425 (Utah 1986); Weber v. Springville City, 725 P.2d 1360 (Utah 1986); Ashton v. Ashton, 733 P.2d 147 (Utah 1987); Porter v. Groover, 734 P.2d 464 (Utah 1987); Lemon v. Coates, 735 P.2d 58 (Utah 1987); Realty World Labrum v. Steadman, 737 P.2d 165 (Utah 1987); Webster v. Lehmer, 742 P.2d 1203 (Utah 1987); Co-Vest Corp. v. Corbett, 735 P.2d 1308 (Utah 1987); Acton v. Deliran, 737 P.2d 996 (Utah 1987); Utah Farm Bureau Mut. Ins. Co. v. Johnson, 738 P.2d 652 (Utah 1987); Topik v. Thurber, 739 P.2d 1101 (Utah 1987); Hatanaka v. Struhs, 738 P.2d 1052 (Utah Ct. App. 1987); Frandsen v. Holladay, 739 P.2d 1111 (Utah Ct. App. 1987); Meier v. Hobbs & Sons, 739 P.2d 641 (Utah Ct. App. 1987); Salt Lake City Sch. Dist. v. Galbraith & Green, Inc., 740 P.2d 284 (Utah Ct. App. 1987); Horman v. Gordon, 740 P.2d 1346 (Utah Ct. App. 1987); Ball v. Volken, 741 P.2d 958 (Utah 1987); Charlie Brown Constr. Co. v. Leisure Sports Inc., 740 P.2d 1368 (Utah Ct. App. 1987); Epstein v. Epstein 741 P.2d 974 (Utah Ct. App. 1987); Crismon v. Western Co. of N. Am., 742 P.2d 1219 (Utah Ct. App. 1987); Killian v. Oberhansly, 743 P.2d 1200 (Utah 1987); Circle Airfreight v. Boyce Equip., 745 P.2d 828 (Utah Ct. App. 1987); Kishpaugh v. Kishpaugh, 745 P.2d 1248 (Utah 1987); Sacramento Baseball Club, Inc. v. Great N. Baseball Co., 748 P.2d 1058 (Utah 1987); State v. DePlonty, 749 P.2d 621 (Utah 1987); Oates v. Chavez, 749 P.2d 658 (Utah 1988); Scherbel v. Salt Lake City Corp., 758 P.2d 897 (Utah 1988); Mountain States Tel. & Tel. v. Sohm, 755 P.2d 155 (Utah 1988); Wilburn v. Interstate Elec., 748 P.2d 582 (Utah Ct. App. 1988); Hansen v. Green River Group, 748 P.2d 1102 (Utah Ct. App. 1988); Miller v. Archer, 749 P.2d 1274 (Utah Ct. App. 1988); Barnes v. Wood, 750 P.2d 1226 (Utah Ct. App. 1988); State ex rel. J. R. T. v. Timperly, 750 P.2d 1234 (Utah Ct. App. 1988); Ted R. Brown & Assocs. v. Carnes Corp., 753 P.2d 964 (Utah Ct. App. 1988); Cove View Excavating & Constr. Co. v. Flynn, 758 P.2d 474 (Utah Ct. App. 1988); In re Estate of Wagley, 760 P.2d 316 (Utah 1988); State v. Lancaster, 765 P.2d 872 (Utah 1988); Crowther v. Carter, 767 P.2d 129 (Utah Ct. App. 1989); Hamby v. Jacobson, 769 P.2d 273 (Utah Ct. App. 1989); State v. Mitchell, 769 P.2d 817 (Utah 1989); Sorensen v. Sorensen, 769 P.2d 820 (Utah Ct. App. 1989); State v. Maurer, 770 P.2d 981 (Utah 1989); In re Schmidt v. Downs, 775 P.2d 427 (Utah Ct. App. 1989); In re Estate of Bartell, 776 P.2d 885 (Utah 1989); Hardy v. Hardy, 776 P.2d 917 (Utah Ct. App. 1989); Southern Utah Mortuary v. Roger D. Olpin S. Utah Mortuaries, 776 P.2d 945 (Utah Ct. App. 1989); Fife v. Fife, 777 P.2d 512 (Utah Ct. App. 1989); State v. Cantu, 778 P.2d 517 (Utah 1989); State v. Featherson, 781 P.2d 424 (Utah 1989); Jolivet v. Cook, 784 P.2d 1148 (Utah 1989); Bell v. Elder, 782 P.2d 545 (Utah Ct. App. 1989); Baxter v. Utah DOT, 783 P.2d 1045 (Utah Ct. App. 1989); Arnold v. B.J. Titan Servs. Co., 783 P.2d 541 (Utah 1989); Terry v. Price Mun. Corp., 784 P.2d 146 (Utah 1989); Riche v. Riche, 784 P.2d 465 (Utah Ct. App. 1989); Doelle v. Bradley, 784 P.2d 1176 (Utah 1989); Jense v. Jense, 784 P.2d 1249 (Utah Ct. App. 1989); State v. Bell, 785 P.2d 390 (Utah 1989); Sweeney Land Co. v. Kimball, 786 P.2d 760 (Utah 1990); Termunde v. Cook, 786 P.2d 1341 (Utah 1990); Ringwood v. Foreign Auto Works, Inc., 786 P.2d 1350 (Utah Ct. App. 1990); Rothe v. Rothe, 787 P.2d 534 (Utah Ct. App. 1990); Burrow v. Vrontikis, 788 P.2d 1046 (Utah Ct. App. 1990); Termunde v. Utah State Prison, 789 P.2d 709 (Utah 1990); Osguthorpe v. Osguthorpe, 791 P.2d 895 (Utah Ct. App. 1990); In re R.R.D., 791 P.2d 206 (Utah Ct. App. 1990); Jarman v. Reagan Outdoor Adv. Co., 794 P.2d 492 (Utah Ct. App. 1990); Mahas v. Rindlisbacher, 808 P.2d 1025 (Utah 1990); Weber v. Snyderville W., 800 P.2d

316 (Utah Ct. App. 1990); State v. Moore, 802 P.2d 732 (Utah Ct. App. 1990); Wagstaff v. Barnes, 802 P.2d 774 (Utah Ct. App. 1990); Ashton v. Ashton, 804 P.2d 540 (Utah Ct. App. 1990); Mont Trucking, Inc. v. Entrada Indus., Inc., 802 P.2d 779 (Utah App. 1990); State v. Harrison, 805 P.2d 769 (Utah Ct. App. 1991); State v. Wilcox, 808 P.2d 1028 (Utah 1991); State ex rel. J.C. v. Cruz, 808 P.2d 1131 (Utah Ct. App. 1991); Hagan v. Hagan, 810 P.2d 478 (Utah Ct. App. 1991); State v. Gardiner, 814 P.2d 568 (Utah 1991); State v. Drobel, 815 P.2d 724 (Utah Ct. App. 1991); Clark v. Booth, 821 P.2d 1146 (Utah 1991); Greenwood v. City of N. Salt Lake, 817 P.2d 816 (Utah 1991); Crouse v. Crouse, 817 P.2d 836 (Utah Ct. App. 1991); Wade v. Jobe, 818 P.2d 1006 (Utah 1991); State v. Taylor, 818 P.2d 1030 (Utah 1991); State v. Ford, 818 P.2d 1052 (Utah Ct. App. 1991); Peterson v. Peterson, 818 P.2d 1305 (Utah Ct. App. 1991); State v. Buford, 820 P.2d 1381 (Utah Ct. App. 1991); State v. Montoya, 825 P.2d 676 (Utah Ct. App. 1991); Allred v. Allred, 835 P.2d 974 (Utah Ct. App. 1992); Potter v. Potter, 845 P.2d 272 (Utah Ct. App. 1993); Baumgart v. Utah Farm Bureau Ins. Co., 851 P.2d 647 (Utah Ct. App. 1993); Robb v. Anderton, 863 P.2d 1322 (Utah Ct. App. 1993); York v. Shulsen, 875 P.2d 590 (Utah Ct. App. 1994); Interiors Contracting, Inc. v. Smith, Halander & Smith Assoc., 881 P.2d 929 (Utah Ct. App. 1994); Ron Shepherd Ins. v. Shields, 882 P.2d 650 (Utah 1994).

COLLATERAL REFERENCES

Am. Jur. 2d. — 75B Am. Jur. 2d Trial § 1967 et. seq.

C.J.S. — 49 C.J.S. Judgments § 236; 88 C.J.S. Trial §§ 609 to 657.

A.L.R. — Power of trial court, on remand for further proceedings, to change prior fact findings as to matter not passed upon by appellate court, without receiving further evidence, 19 A.L.R.3d 502.

Propriety and effect of trial court's adoption of findings prepared by prevailing party, 54 A.L.R.3d 868.

Application of "clearly erroneous" test by Rule 52(a) of the Federal Rules of Civil Procedure to trial court's findings of fact based on documentary evidence, 11 A.L.R. Fed. 212.

Key Numbers. — Judgment ⇐ 297; Trial ⇐ 388 to 405.

Rule 53. Masters.

(a) **Appointment and compensation.** Any or all of the issues in an action may be referred by the court to a master upon the written consent of the parties, or the court may appoint a master in an action, in accordance with the provisions of Subdivision (b) of this rule. As used in these rules the word "master" includes a referee, an auditor, and an examiner. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) **Reference.** A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall, in the absence of the written consent of the parties, be made only upon a showing that some exceptional condition requires it.

(c) **Powers.** The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded

COLLATERAL REFERENCES

Brigham Young Law Review. — Multiple Jury Formats and Civil Litigation: *Arnold v. Eastern Airlines,* 1991 B.Y.U. L. Rev. 1005.

Am. Jur. 2d. — 1 Am. Jur. 2d Actions § 110 et seq.; 75 Am. Jur. 2d Trial § 115 et seq.

C.J.S. — 1 C.J.S. Actions §§ 109, 117 to 122; 88 C.J.S. Trial §§ 6 to 10.

A.L.R. — Propriety of separate trials of issues of tort liability and of validity and effect of release, 4 A.L.R.3d 456.

Propriety of ordering separate trials as to liability and damages, under Rule 42(b) of Federal Rules of Civil Procedure, in actions involving personal injury, death, or property damage, 78 A.L.R. Fed. 890.

Propriety of ordering separate trials as to liability and damages, under Rule 42(b) of Federal Rules of Civil Procedure, in civil rights actions, 79 A.L.R. Fed. 220.

Propriety of ordering separate trials as to liability and damages, under Rule 42(b) of Federal Rules of Civil Procedure, in actions involving patents and copyrights, 79 A.L.R. Fed. 532.

Propriety of ordering separate trials as to liability and damages, under Rule 42(b) of Federal Rules of Civil Procedure, in contract actions, 79 A.L.R. Fed. 812.

Propriety of ordering consolidation under Rule 42(a) of Federal Rules of Civil Procedure in civil rights actions, 81 A.L.R. Fed. 732.

Propriety of ordering consolidation under Rule 42(a) of Federal Rules of Civil Procedure in actions involving patents, copyrights, or trademarks, 82 A.L.R. Fed. 719.

Propriety of ordering consolidation under Rule 42(a) of Federal Rules of Civil Procedure in actions involving securities, 83 A.L.R. Fed. 367.

Key Numbers. — Action ⇐ 56, 60; Trial ⇐ 2 to 4.

Rule 43. Evidence.

(a) **Form.** In all trials, the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules, the Utah Rules of Evidence, or a statute of this state. All evidence shall be admitted which is admissible under the Utah Rules of Evidence or other rules adopted by the Supreme Court.

(b) **Evidence on motions.** When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

(Amended effective Jan. 1, 1987.)

Compiler's Notes. — This rule is similar to Rule 43(a) and (e), F.R.C.P.

Cross-References. — Evidence generally, § 78-25-2 et seq.

Relevancy and its limits, U.R.E. 401 to 411.

Witnesses, U.R.E. 601 to 615.

NOTES TO DECISIONS

ANALYSIS

Form.

—Open court.

——Judge's request for investigation.

Failure of judge in divorce action to notify counsel of his asking juvenile authorities to investigate the homes of both parties and make a report thereon did not violate the requirement of Subdivision (a), that all testimony be in open court, to such a degree as to warrant a retrial. Austad v. Austad, 2 Utah 2d 49, 269 P.2d 284 (1954).

Motions.

—Evidentiary hearing.

Although a court can grant or deny a motion on the sole or combined bases of affidavits, depositions or oral testimony, when no depositions have been taken and disputed material facts are alleged in opposing affidavits, there should be an evidentiary hearing to aid in the resolution of those facts. Stan Katz Real Estate, Inc. v. Chavez, 565 P.2d 1142 (Utah 1977).

Witnesses.

Since plaintiff's untimely designation of her new expert witness violated the district court's instruction as to the deadline for designating witnesses, the court's action in granting defendant's motion in limine to exclude the witness clearly was not an abuse of discretion, and it did not matter that the parties agreed between themselves to allow plaintiff further time to designate her new expert witness. Hill v. Dickerson, 839 P.2d 309 (Utah Ct. App. 1992).

Cited in Midgley v. Denhalter, 121 Utah 385, 242 P.2d 565 (1952); Best v. Huber, 3 Utah 2d 177, 281 P.2d 208 (1955).

(7) The panel shall develop necessary procedures for its operation and shall publish such procedures as an appendix to this Code.
(Added effective April 15, 1991.)

ARTICLE 4.
DOMESTIC RELATIONS.

Rule 6-401. Domestic relations commissioners.

Intent:

To identify the types of cases and matters which commissioners are authorized to hear, to identify the types of relief which commissioners may recommend and to identify the types of final orders which may be issued by commissioners.

To establish a procedure for judicial review of commissioners' decisions.

Applicability:

This rule shall govern all domestic relations court commissioners serving in the District Courts.

Statement of the Rule:

(1) **Types of cases and matters.** All domestic relations matters filed in the district court in counties where court commissioners are appointed and serving, including all divorce, annulment, paternity and spouse abuse matters, orders to show cause, scheduling and settlement conferences, petitions to modify divorce decrees, scheduling conferences, and all other applications for relief, shall be referred to the commissioner upon filing with the clerk of the court unless otherwise ordered by the Presiding Judge of the District.

(2) **Authority of Court Commissioner.** Court commissioners shall have the following authority:

(A) Upon notice, require the personal appearance of parties and their counsel;

(B) Require the filing of financial disclosure statements and proposed settlement forms by the parties;

(C) Obtain child custody evaluations from the Division of Family Services pursuant to Utah Code Ann. Section 62A-4-106, or through the private sector;

(D) Make recommendations to the court regarding any issue, including a recommendation for entry of final judgment, in domestic relations or spouse abuse cases at any stage of the proceedings;

(E) Require counsel to file with the initial or responsive pleading, a certificate based upon the facts available at that time, stating whether there is a legal action pending or previously adjudicated in a district or juvenile court of any state regarding the minor child(ren) in the current case;

(F) At the commissioner's discretion, and after notice to all parties or their counsel, conduct evidentiary hearings consistent with paragraph (3)(C) below;

(G) Impose sanctions against any party who fails to comply with the commissioner's requirements of attendance or production of discovery;

(H) Impose sanctions against any person who acts contemptuously under Utah Code Ann. Section 78-32-10;

(I) Issue temporary or ex parte orders;

(J) Conduct settlement conferences with the parties and their counsel for the purpose of facilitating settlement of any or all issues in a domestic relations case. Issues which cannot be agreed upon by the parties at the settlement conference shall be certified to the district court for trial; and

(K) Conduct pretrial conferences with the parties and their counsel on all domestic relations matters unless otherwise ordered by the presiding judge. The commissioner shall make recommendations on all issues under consideration at the pretrial and submit those recommendations to the district court.

(3) **Duties of Court Commissioner.** Under the general supervision of the presiding judge, the court commissioner has the following duties prior to any domestic matter being heard by the district court:

(A) Review all pleadings in each case;

(B) Certify those cases directly to the district court that appear to require a hearing before the district court judge;

(C) Except in cases previously certified to the district court, conduct hearings with parties and their counsel for the purpose of submitting recommendations to the parties and the court;

(D) Coordinate information with the juvenile court regarding previous or pending proceedings involving children of the parties; and

(E) Refer appropriate cases to mediation programs if available.

(4) **Objections.** With the exception of pre-trial orders, the commissioner's recommendation is the order of the court until modified by the court. Any party objecting to the recommended order shall file a written objection to the recommendation with the clerk of the court and serve copies on the commissioner's office and opposing counsel. Objections shall be filed within ten days of the date the recommendation was made in open court or if taken under advisement, ten days after the date of the subsequent written recommendation made by the commissioner. Objections shall be to specific recommendations and shall set forth reasons for each objection.

(5) **Judicial review.** Cases not resolved at the settlement or pretrial conference shall be set for trial on all issues not resolved. All other matters shall be reviewed in accordance with Rule 4-501.

(6) **Prohibitions.**

(A) Commissioners shall not make final adjudications of domestic relations matters.

(B) Commissioners shall not serve as pro tempore judges in any matter, except as provided by Rule of the Supreme Court.

(Amended effective January 15, 1990; April 15, 1991; November 15, 1995.)

Amendment Notes. — The 1995 amendment inserted "including a recommendation for entry of final judgment" in Subdivision (2)(D); deleted former Subdivision (2)(G), authorizing commissioners to adjudicate default and uncontested divorces and uncontested modifications; deleted "Enter a default judgment" from the beginning of present Subdivision (2)(G); deleted "other than default or uncontested divorces and modifications" from the end of Subdivision (6)(A); and, made related stylistic changes.

NOTES TO DECISIONS

ANALYSIS

Scope of authority.
Ten-day objection period.

Scope of authority.

Domestic relations commissioner's order enforcing an out-of-state custody decree and denying an in-state mother's request for a hearing to challenge the foreign decree was an unconstitutional exercise of judicial power. Holm v. Smilowitz, 840 P.2d 157 (Utah Ct. App. 1992).

Ten-day objection period

The ten-day period under Subdivision (4) for filing an objection to a commissioner's recommended order does not make the order provisional nor limit the judge's authority to act on the order within the objection period. An order that was signed within the ten-day objection period was a judgment from which statutory interest accrued. Hoagland v. Hoagland, 852 P.2d 1025 (Utah Ct. App. 1993).

Rule 6-402. Repealed.

Repeals. — Rule 6-402, relating to the names of parties in divorce complaints, was repealed in 1989.

Rule 6-403. Shortening 90-day waiting period in domestic matters.

Intent:

To establish a procedure for shortening or waiving the 90-day waiting period in domestic cases.

Applicability:

This rule shall apply to the district courts.

Statement of the Rule:

(1) Proceedings on the merits of a divorce action shall not be heard by the district courts unless 90 days have elapsed from the time the complaint was filed or unless the Court finds that there is good cause for shortening or eliminating the waiting period and enters a formal order to that effect prior to the hearing date.

(2) Application for a hearing less than 90 days from the date the complaint was filed shall be made by motion and accompanied by an affidavit setting forth the factual matters constituting good cause. The motion and supporting affidavit(s) shall be served on the opposing party at least five days prior to the scheduled hearing unless the party is in default.

(3) In the event the Court finds that there is good cause for hearing in less than 90 days from the filing of the complaint, the facts constituting such cause shall be included in the findings of fact and presented to the Court for signature.

Rule 6-404. Modification of divorce decrees.

Intent:

To establish procedures for modification of existing divorce decrees.

Applicability:

This rule shall apply to all district courts.

Statement of the Rule:

(1) Proceedings to modify a divorce decree shall be commenced by the filing of a petition to modify in the original divorce action. Service of the petition and summons upon the opposing party shall be in accordance with the requirements of Rule 4 of the Utah Rules of Civil Procedure. No request for a modification of an existing decree shall be raised by way of an order to show cause.

(2) The responding party shall serve the reply within twenty days after service of the petition. Either party may file a certificate of readiness for trial. Upon filing of the certificate, the matter shall be referred to the domestic relations commissioner prior to trial, or in those districts where there is not a domestic relations commissioner, placed on the trial calendar.

(3) No petition for modification shall be placed on a law and motion or order to show cause calendar without the consent of the commissioner or the district judge.